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168 - 24315



MACAHOY ADVERTISING COMPANY,
a corporation,

Appellee

vs.

GEORGE H. LESLIE

APPEAL FROM DECISION OF
COURT OF CHICAGO.

Appellant.

215 I.A. 629

MR. PRESIDING JUSTICE MATHRETT
DELIVERED THE OPINION OF THE COURT.

On trial by jury a verdict was rendered in favor of plaintiff, on which the court entered judgment.

The plaintiff sued on a written contract for advertising, signed by defendant. The amount of the bill was not disputed, but by way of defense it was claimed that the advertising in the first instance was for the benefit of a Wisconsin corporation organized in November, 1915, known as Consolidated Sales Corporation, and that the defendant, this corporation and plaintiff had mutually agreed that the defendant should be released and the corporation accepted as debtor for the account.

The alleged novation agreement was claimed to have been made on January 27, 1917, at a meeting of the board of directors of the Sales Corporation held at the LaSalle Hotel in the City of Chicago. Mr. M. W. Macahoy, president of the plaintiff corporation, was present at that meeting, and the evidence tends strongly to prove that defendant Leslie at that time drew the bill for the advertising from his pocket and stated that he was about to go to California, and as the corporation then had plenty of funds, requested that the account be closed out against him and sent to the Sales Company; that the officials of the Sales Company agreed; defendant so testified and he is corroborated by the minutes of the board of directors of the corpora-

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tion, by the testimony of several witnesses who were present, and further, by the fact that on the following day the bill was mailed by plaintiff to the Sales Corporation. The testimony of these witnesses was denied by Mr. Macavoy and there were circumstances in evidence tending to support the theory of both parties.

A sharp issue of fact was thus made on the question of whether defendant had been in fact released from his obligation to pay the bill and the Sales Company accepted in his place.

During the meeting at the Mobile Hotel the bank book of the Sales Corporation was produced, showing a deposit of \$27,000 which had been made to the credit of the Sales Corporation from sales of stock made to one William M. O'Connell, and that later, while defendant Leslie was absent in California, O'Connell had drawn out \$20,000.00 of this sum.

In his argument to the jury counsel for plaintiff said: "Now then, they got hold of an angel by the name of O'Connell to put in \$27,000.00, and they flourished the bank book with that \$27,000.00. * * * I will show you what happened. I believe that it was a proposition between these foxes to carry that bank book around, because what happened. I think they wanted Mr. Macavoy to launch \$17,000.00 worth of advertising and flourished this bank book in front of his face, 'We are going to make Macavoy see that we have \$27,000.00 in the bank, and he is going to extend \$17,000.00 worth of credit to us on the strength of it,' and just as that meeting was over with and Leslie went away, what do we find happened? Bill O'Connell stuck his hand in the treasury of the Company and takes out the last dollar from the bank and pays himself back. * * * That is what they had in mind. They thought they were going to slip \$17,000.00 worth of credit over on Macavoy, but just as soon as they got \$17,000.00 worth of advertising, they would take the money out of the bank and let them look to-----



Can't you see the game they were trying to put over? It is just as plain to me as anything can be." Counsel for the defendant objected to this line of argument, but the court failed to rule on the objection and permitted the case to go to the jury with the impression that the court considered the argument legitimate. It was not legitimate because there were no facts in evidence tending to sustain it, nor was any such issue in the case.

The case was a close one on the facts, if indeed a preponderance of the evidence did not sustain the contention of the defendant. A litigant will not be allowed to retain the benefits of a judgment obtained by an unfair and prejudicial appeal. Chicago Union Traction Co. v. Lauth, 216 Ill. 184. The judgment will therefore be reversed and the cause remanded.

REVERSED AND REMANDED.

176 - 24523

HELEN MCCORMICK,
Appellee,

vs.

RICHARD J. MCCORMICK et al.
On Appeal of JOHN A. MCCORMICK
individually and as Executor
of the will of Margaret McCormick,
deceased,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

215 I.A. 629

MR. PRESIDING JUSTICE MATCHETT

DELIVERED THE OPINION OF THE COURT.

In this case the original suit was brought by complainant, Helen McCormick, against her husband, Richard J. McCormick, praying for separate maintenance and other relief provided for under section 11, chapter 68, Hurd's Revised Statutes, 1917, page 1654.

The decree found the equities with the complainant, set aside a certain conveyance of real estate made by Richard J. McCormick, granted separate maintenance as prayed, and authorized and directed complainant to sell the property of said Richard J., and apply the proceeds to the payment of debts incurred for the support of the family, costs and expenses of suit, including solicitors' fees, and apply the remainder on the allowance made for complainant's support.

John A. McCormick alone appeals, claiming the decree is erroneous as to him. The controversy, in so far as appellant is concerned, grows out of the disposition made by the decree of the interest of Richard J. McCormick acquired through the last will and testament of his mother, Margaret McCormick.

Said Margaret McCormick died January 3, 1911, seized of certain real estate described in the bill and in the decree. Her will (the bill alleges and the decree finds) gave the executor

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power to sell the real estate but made no devise in fee. It did, however, devise and bequeath the sum of \$1,000, to be paid out of the proceeds of the real estate to Richard, and further gave him an interest in the proceeds of sale, amounting to 1/23rd part thereof, over and above the sum of \$24,000.

John A. McCormick, appellant, on the 28th day of June, 1913, in a burnt record proceeding then pending in the Circuit court of Cook County, obtained a decree that he, as executor, was the fee simple owner of said real estate. He subdivided the same into lots and sold a part thereof, and from these sales netted approximately \$50,000. Unsold lots are of a value in excess of \$100,000, and Richard J's interest in the sold and unsold portions was shown to be of the value of \$5,301.

This entire interest was claimed by John A. McCormick by virtue of an assignment which was absolute on its face, but which the decree finds was, in fact, in the nature of security for an indebtedness amounting to \$2,806.59. The decree authorized the complainant to sell "the interest of said Richard J. McCormick, as heir at law of Margaret McCormick, deceased, in the real estate herein secondly above described, together with the legacies to said Richard J. McCormick, under the will of said Margaret McCormick, deceased, subject to the aforesaid assignment to the said John A. McCormick."

Appellant contends that the court erred in holding that the assignment from Richard J. to John A. McCormick of the former's interest under his mother's will was merely in the nature of a security, and in his petition for a rehearing (which was granted) says that the second branch of this court in *Goetz v. McCormick*, general number 24036, and *Heym v. McCormick*, general number 24037, which cases have not yet been reported, held the contrary. We have examined these decisions and think appellant is mistaken as to the holding of the court. The question decided

there arose in attachment suits brought against Robert J. McCormick by certain creditors, in which John A. McCormick, as executor, was summoned as garnishee. The Appellate court held that the assignment to John A. McCormick was valid and binding, but it did not decide, nor was it necessary for it to decide, whether said assignment was in the nature of security for money advanced. In the instant case, which is a proceeding in equity and not at law, the assignment is also held valid and binding, but it is further held that it was given as security for debts, although absolute in form. We think now, as we thought before the rehearing was granted, that the evidence abundantly sustained the finding.

Appellant also contends that the decree was erroneous because it provided for the payment of solicitors' fees out of the proceeds of the sale, because, as he says, solicitors' fees are not provided for under said section 11. The suit was for separate maintenance, as well as for the relief provided for by said section 11. We therefore think there was no error in directing the payment of solicitors' fees, but, at any rate, the appellant has no standing to assign error on that point.

Appellant further contends that it was error to direct the sale of the real estate of Richard J. McCormick, and that the effect thereof will be to cloud his title as executor to the McCormick Subdivision. Richard J. McCormick was not a party to the burnt record proceeding, which vested the title in appellant in fee simple; therefore neither he nor complainant is bound thereby.

The will of Margaret McCormick gave the executor no express power to sell, and we think it is very doubtful whether an implied power in his behalf could be inferred from its provisions. If not, there would be no equitable conversion as in Grove v. Willard, 280 Ill. 247, on which appellant relies. Romer-

son v. Merritt, 249 Ill. 538.

But whether we regard the fee of the land as having descended to the heirs or as vested in the executor for their benefit, we think a court of equity in a proceeding of this character could empower complainant to sell whatever interest Richard J. McCormick had therein.

The decree will be affirmed.

AFFIRMED.

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176 - 24523

HELEN McCORMICK,
Appellee,

vs.

RICHARD J. McCORMICK et al.,

On Appeal of JOHN A. McCORMICK,
individually and as executor of
the will of MARGARET McCORMICK,
deceased,

Appellant.

Appeal from

Superior Court,

Cook County.

215 I.A. 629

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by John A. McCormick, as executor of the last will and testament of Margaret McCormick, from a decree. The appellee has not appeared in this court.

The suit was brought by Helen McCormick against appellant and her husband, Richard J. McCormick, under section 11, Chap. 68, Hurd's Revised Statutes, 1917, page 1654.

Richard J. McCormick does not join in the appeal. The evidence abundantly justifies the decree entered against him. The principal contention of appellant is that the chancellor erred in finding that a certain assignment of Richard J. McCormick to John A. McCormick of all his interest in the estate of their mother, Margaret McCormick, for an expressed consideration of \$1.00, was in the nature of a security for debts due. We have examined the evidence, and think it justifies the finding of the chancellor. The other alleged errors argued are not prejudicial to appellant. He cannot assign error for his co-defendants.

The decree will be affirmed.

AFFIRMED.

050.11.113

M. MEYERHOFF,
Appellant,

vs.

LOUIS VEHON & SONS,
a corporation,
Appellee.

Appeal from Municipal Court
of Chicago.

215 I.A. 629

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

Appellant, who was plaintiff below, sued appellee, defendant, for the rent of certain premises for the month of January, 1918, claiming under the terms of a certain lease, which it is alleged defendant had assumed. The trial was by the court and finding for the defendant, upon which judgment was entered.

The premises were known as No. 4125 South Halsted street. The plaintiff was in possession by written lease from the owner and for several years conducted a clothing store therein, which the defendant purchased under the terms of a written agreement, dated February 17, 1915. The agreement provided, "It is further agreed that said party of the first part is to transfer his lease on said store, subject to the permission granted by the landlord, and upon the same terms and the same rental he is paying therefor, and ^{said} second party agrees to pay said rental promptly to said party of the first part as set forth in said lease until the expiration of the lease before stated." Defendant took possession and for about three years paid the rent to plaintiff who continued to pay rent to the owner under the written lease.

In December, 1918, defendant notified plaintiff that on January 1, 1918, it would vacate the premises, and that on the first of February, 1918, it would terminate its tenancy

155-1512

thereof. It was apparently defendant's theory that it was only a tenant from month to month, because the lease to plaintiff provided that it might not be assigned or sublet without the written consent of the landlord. There was, however, a type-written provision attached which provided the premises might be sublet, "provided, he will secure a party suitable to the lessor and remain a guarantor upon said lease." The written contract between plaintiff and defendant was made in conformity with this provision. In this respect the case is clearly distinguishable from Kazidis v. Trawson, 307 Ill. App. 302, on which appellee relies.

Appellant under the terms of his contract was entitled to recover the sum of \$100 for the rent of the premises for February, 1918. The judgment of the Municipal Court will therefore be reversed with a finding of fact and judgment entered here for that amount with interest at 5% from Feb. 1, 1918.

REVERSED WITH FINDING OF FACT
AND JUDGMENT HERE.

The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the results of its investigation of the activities of the Communist Party in the United States. The second is the fact that the Commission has not yet received any information from the Government of the United States regarding the results of its investigation of the activities of the Communist Party in the United States. The third is the fact that the Commission has not yet received any information from the Government of the United States regarding the results of its investigation of the activities of the Communist Party in the United States.

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Very truly yours,
 [Signature]

199 - 24547

FINDING OF FACT.

We find from the evidence that there is due to appellant, M. Meyerhoff, from appellee, Louis Vehon & Sons, the sum of \$100 for the rent of premises known as No. 4125 S. Halsted street, in the city of Chicago, for the month of February A. D. 1918, with interest on said sum from February 1, 1918, to the date of judgment here.

1911 - 1912

Summary of Work

The work of the year has been devoted to the study of the life history of the American oystercatcher, *Actenoides americanus*, with special reference to its habits and nesting habits. The birds were collected in the marshes of the Chesapeake Bay, and the results of the study are given in the following pages.

220 - 24569

REGENSTRINER (COLORTYPE
COMPANY, a corporation,
Appellee,

vs.

CENTRAL TRUST COMPANY OF
ILLINOIS, Trustee in Bankruptcy
of NICHOLS-FINN ADVERTISING
COMPANY, a corp.,
Appellant.

Appeal from
Municipal Court
of Chicago.

215 I.A. 629

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant on a claim for labor and material furnished to it under a written order which defendant gave for 500,000 motion picture booklets.

Plaintiff's statement alleged that plaintiff complied with all the terms of the written order; that defendant notified it to stop the work after a part of the books were delivered and that there was due to plaintiff from defendant the sum of \$1,158.32, and, in addition, the sum of \$30 for art work "performed by plaintiff for defendant at its special instance and request."

The affidavit of merits set up specific facts and denied plaintiff's right to recover for the booklets, and generally denied that defendant was indebted as alleged "in any other amount whatsoever."

Both parties offered evidence, tending to sustain their contentions respectively as to the booklets, but no evidence was offered on the claim for art work.

The court instructed the jury orally, telling it on what conditions it might find for either party on the issues as to the booklets, but also told it that plaintiff was entitled to recover, at least, \$30 for the art work, and gave only one form of verdict which was for the plaintiff, with a

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blank for the insertion of the amount found as damages. The defendant claims this was error, but plaintiff insists it was not, for the reason, as he says, that the claim for art work was not denied by the affidavit of merits, except by the general statement that defendant was not indebted "in any other amount whatsoever."

We do not think, however, it was necessary for defendant's affidavit to be more specific as to that item than was plaintiff's statement of claim. Wolfert v. Lipsey Co., 189 Ill. App. 34. Both were general. Moreover, plaintiff did not, in the trial court, question the sufficiency of the affidavit of merits as it should have done, if it desired to raise this question here. McKenzie v. Penfield, 87 Ill. 38. We think the court erred. Morrill v. Lindemann, 86 Ill. App. 75; People v. Marks, 251 Ill. 475.

Plaintiff contends that even if error is conceded defendant cannot now be heard to urge it, because it was waived by defendant's failure to object specifically at the time the jury was instructed, as was requested by the court in conformity with the practice under certain rules of the Municipal Court, which required objections to instructions to be made before the jury retired. These rules are not preserved in the bill of exceptions. We therefore cannot consider them. Scovill Mfg. Co. v. Cassidy, 275 Ill. 462; Sixby v. Chicago City Ry. Co., 260 Ill. 478; Falls City Tannery v. W. D. Allen Mfg. Co., 205 Ill. App. 462. In view of the colloquies in regard to the art item we think the court was not misled as to defendant's position with respect to it.

For the error indicated the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

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228 - 24578

ABRAHAM PRIESS, Appellee,
vs.
WILLIAM T. WOODLEY, Appellant.

Appeal from Circuit Court,
Cook County.

215 I.A. 630

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from judgment entered upon a verdict of a jury, which verdict was directed by the court.

Plaintiff, appellee, sued the defendant upon his written guaranty of a lease of a theatre building and its contents. The lease was dated February 1, 1913. By its terms defendant Woodley as lessor, demised the premises and personal property therein to one Beyeradorfer from that date until November 30, 1915, at a rental of \$150 per month. The lease was executed under seal.

On March 6, 1913, defendant assigned "the within lease and the rents thereby secured" to one Jacob Bass. By the terms of the assignment the defendant also guaranteed the payment of the rents to Bass, his heirs and assigns. On September 17th thereafter, Bass assigned the lease and rents to plaintiff Abraham Priess. Rent becoming due and unpaid under the terms of the lease, plaintiff sued defendant therefor.

In his declaration he set up the lease of the premises, the assignments and guaranty, and attached a copy of the lease with affidavit of the amount due to the declaration. The defendant filed pleas of the general issue and want of consideration. Upon trial plaintiff offered in evidence the lease and written assignments thereon, with proof that rent was due and unpaid, and defendant offering no evidence, the court directed a verdict for plaintiff.

June 1, 1900

My dear Mr. [Name]

Dear Sir,

I have the pleasure to acknowledge the receipt of your letter of the 28th inst.

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On the 1st inst. I received from [Name] a letter in which he informed me that he had been appointed to the position of [Title] at [Location].

I am glad to hear that you have been appointed to this position, and I trust that you will find it a most interesting and profitable one. I have no doubt that you will be able to do much good in the [Location] and that you will be able to make a valuable contribution to the [Cause]. I am sure that you will be able to do this in a most efficient manner, and I am sure that you will be able to make a valuable contribution to the [Cause]. I am sure that you will be able to do this in a most efficient manner, and I am sure that you will be able to make a valuable contribution to the [Cause].

I am, Sir, very respectfully,
Yours truly,
[Signature]

Two reasons are urged for reversal. First, it is said that plaintiff could not maintain a suit in his own name without complying with Sec. 18 of the Practice Act, Revised Statutes of Illinois, Chap. 110, J. & A. par. 8555. We think the sufficient answer to this contention is that section 18 aforesaid, is not applicable to the claim set forth in plaintiff's statement. Plaintiff did not sue as "the assignee and equitable and bona fide owner of any chose in action not negotiable heretofore * * * " within the meaning of that statute.

It is further urged that there is no evidence to show a consideration for the defendant's guaranty. The guaranty recites a consideration, and defendant offered no evidence in support of his plea. The contention raised as to this particular guaranty was decided adversely to appellant's contention in Bass v. Woodley, 205 Ill. App. 469.

The judgment will be affirmed.

AFFIRMED.

243 - 24594

RUBY L. WINN,
Appellant,

vs.

CHAUNCEY KEEP, ARTHUR B. JONES,
and THE MERCHANTS LOAN & TRUST
COMPANY, a corporation, Trustees
of the estate of Marshall Field,
deceased,

Appellees.

Appeal from

Circuit Court,

Cook County.

215 I.A. 630

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment for defendant entered upon the verdict of a jury, which verdict was directed by the court at the conclusion of plaintiff's case.

The case was before this court on a former appeal. The judgment in favor of the plaintiff was there reversed and the cause remanded. Winn v. Keep, 205 Ill. ^{App.} 618.

The declaration in several counts charges that the defendant negligently constructed and maintained a door and step, leading from a corridor on the twelfth floor of an office building owned and controlled by defendant, to a men's toilet room, situated near the elevator on the same floor; that by reason thereof, this door violently struck against plaintiff, while she was walking in the corridor in the exercise of due care. In one count it is alleged that the door was violently pushed open and against plaintiff by a servant of defendant.

The testimony on this trial as to the construction and maintenance of the door and step is the same as it was on the former trial. It showed that the floor of the toilet room was above the level of the corridor about seven and a half inches; that the floor came up flush with the door; that the door,

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unlike other doors on that floor, opened outwardly into the corridor, and that when the door was closed, the elevation or step could not be seen from either side of the door.

The testimony of plaintiff as to the manner in which she was injured is also the same as that given on the former trial. It is to the effect that while she was passing along the corridor, the door suddenly swung open and against her body with violence.

Plaintiff also produced as a witness one Grender, the man who came out of the closet through the door at the time she received her alleged injuries, and who did not testify on the former trial. This witness, however, contradicted the testimony of plaintiff, to the effect that the door opened with violence; on the contrary, he says that he opened the door without violence and in an ordinary manner. He says he did not fall or pitch forward nor open the door with any unusual force.

The rule to be applied upon a motion for a directed verdict at the close of plaintiff's testimony is stated in Libby, McNeil & Libby v. Cook, 222 Ill. 212.

"If, however, there is in the record any evidence from which, if it stood alone, the jury could, without acting unreasonably in the eye of the law, find that all the material averments of the declaration had been proved, then the case should be submitted to the jury."

See also Devine v. Delano, 272 Ill 179; Kelly v. Chicago Rys. Co., 283 Ill. 640.

We do not find anything in this evidence from which a jury could reasonably find any negligence as charged. Grender was not the servant of defendant. Plaintiff argues that taking the whole testimony in the light most favorable to her, (which we must) it tends to show that the door swung violently outward and against her, because of a fault of construction or maintenance. She says this could be inferred from Grender's testimony, that he did not fall against or push the door open with unusual

force.

It is true that a jury would have the right to believe the testimony of plaintiff that the door swung open violently, although this was denied by Grender, called as plaintiff's witness. It would have the right to believe Grender's testimony that he did not cause the door to open violently while it believed plaintiff's testimony to the effect that it struck plaintiff with unusual force. But, even taking this view of the case, we do not think the jury could reasonably find that the violent opening of the door was the result of negligent maintenance or construction. It might so guess or conjecture, but a verdict must be based on a reasonable inference.

Plaintiff has had the benefit of two trials. In both, we think, she failed to prove any negligence as alleged in her declaration. Ware v. Evangelical Baptist Benevolent & Miss. Soc. of Boston, 181 Mass. 235. The judgment will therefore be affirmed.

AFFIRMED.

258 - 24609

ST. LOUIS ESTES,
Appellant,

vs.

H. A. VARNEY,
Appellee.

Appeal from Municipal
Court of Chicago.

215 I.A. 630

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from a judgment for defendant entered on a verdict directed by the court at the conclusion of plaintiff's evidence.

Plaintiff sued in replevin to recover possession of one Haynes motor car or automobile with its equipment. He filed an affidavit in the usual form, alleging that he was the owner and entitled to possession and that defendant unlawfully took and detained said chattel from him. The writ issued and the return showed the property taken on it. Defendant filed an affidavit of Merits in which he set up that he "took and does detain * * * "by virtue of the foreclosure of a certain chattel mortgage, executed, recorded, etc. that at the time of foreclosure there was due from plaintiff to the defendant \$150.00 upon the chattel mortgage notes so secured.

The testimony for plaintiff showed the purchase by him from defendant of the chattel in question for the sum of \$500, \$250 of the amount was paid in cash at the time of delivery. For the balance plaintiff executed and delivered to defendant notes of \$50.00 each, and executed a chattel mortgage, securing same. He also testified to certain representations as to the condition of the automobile which were untrue. He also offered evidence (which we think was erroneously excluded by the court, Hutt v. Bruckman, 55 Ill. 441) to show that the

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damages by reason of the false representations exceeded the amount due and unpaid upon the notes. The defendant offered no evidence. The notes and mortgage upon which he relied were not offered in evidence. Plaintiff's evidence showed that some of the notes were due and unpaid and that plaintiff had told defendant that he would not pay them on account of the damages plaintiff had sustained because of the falsity of defendant's representations as to the condition of the automobile.

But what rights, if any, the chattel mortgage gave defendant in such case, in the absence from the record of the mortgage and notes we are unable to determine. Plaintiff's evidence was prima facie sufficient to prove a wrongful taking. In such case no demand would be necessary before bringing suit. Chase Bros. Piano Co. v. Connors, 182 Ill. App. 418. In this condition of the record it was error for the court to direct a verdict for defendant. Devine v. Delano, 272 Ill. 179; Kelly v. Chicago City Ry. Co., 283 Ill. 640.

For the error in directing a verdict the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

294 - 24645

MARY LYNG and GORDON
C. RAMSAY, Public Admin-
istrator,

Appellees,

vs.

ENGLEWOOD LODGE NO. 221,
LOYAL ORDER OF MOOSE,
Appellant.

Appeal from Municipal
Court of Chicago.

215 I.A. 630

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment entered in favor of appellees.

The record as originally filed, failed to show that an appeal was prayed by defendant, and a motion having been made by appellees to dismiss for that reason, a supplemental record was filed which shows the appeal was prayed and allowed at the time of the entry of the judgment.

A motion has also been made, on insufficient grounds, however, to strike the bill of exceptions from the record, which must also be denied.

The plaintiff below was Mary Lyng, the widow of Patrick J. Lyng, who died January 28, 1916. Her statement of claim alleged that \$100 was due to her upon the promise of the defendant lodge, as contained in section 6 of its by-laws, which provides as follows:

"On the death of a beneficiary member of good standing in this Lodge, the Lodge shall appropriate \$100 for funeral expenses, according to the laws of the order."

That Patrick J. Lyng died in good standing, but that the lodge had refused to pay.

The affidavit of merits denied the defendant had entered into any agreement to pay \$100 upon the death of Patrick J. Lyng, as alleged, and denied that he was in good standing with the lodge at the time of his death.

The evidence for plaintiff showed that the said Patrick

J. Lyng made application for membership in said lodge in July, 1915, that he paid an initiation fee of \$5.00, and on January 12, 1916, paid \$2.50, being dues for three months, that he died on January 28, 1916, and that the by-laws of the order had a provision therein as stated in the statement of claim. That she paid the funeral expenses of her said husband (what the amount was, however, she does not state) and thereupon demanded payment of \$100 from the secretary of the lodge, which was refused.

It appeared the defendant lodge was a subordinate lodge, organized, chartered and governed by the supreme lodge, and that the general laws of the order at the time of Lyng's death provided that an appropriation should be made for funeral expenses of those only who had been members continually in good standing for at least a year prior to death.

The plaintiff claims that this law of the order did not exist at the time of the deceased's initiation, but made no attempt to show what the laws of the order were at that time. As the appropriation was to be made only "according to the laws of the Order," we think it was a necessary part of plaintiff's case to prove what the laws of the order were, and that she was entitled to recover according to their terms.

The judgment entered would have to be reversed for another reason. It is entered in favor of Mary Lyng and Gordon Ramsay, public administrator. After the case had been tried by a jury, plaintiff, over objection, obtained leave of court to make Gordon Ramsay, public administrator, additional party plaintiff to the suit. There is no amended statement of claim to which he is a party, nor is there any proof in the record of a joint liability to Mary Lyng and Gordon Ramsay, public administrator. It is not even alleged or proved that Gordon Ramsay is the administrator of the estate of Patrick J. Lyng. Ency. of Pl. & Pr., Vol. 11, p. 843 and cases there cited.

For the reasons already indicated, the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED

302 - 24653

VAL BLATZ BREWING COMPANY,
a corporation,
Appellant,

vs.

ANTON J. CARMAN, Bailiff of
the Municipal Court of
Chicago,
Appellee.

Appeal from
Circuit Court,
Cook County.

215 I.A. 631

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from a judgment entered upon the verdict of a jury.

The action was replevin for the possession of certain goods and chattels described in the declaration, which was in the usual form, alleging that defendant, as bailiff, took and unlawfully detains the same, etc. To this declaration the defendant filed pleas, alleging that the property in question was the property of the North Star Inn Company, a corporation, and not of the plaintiff, and a further plea that defendant had taken the goods upon a writ ^{of} fieri facias sued out of the Municipal Court by one Albert E. Popp on January 16, 1916, against said North Star Inn Company, a corporation, and delivered it to defendant on that date for execution.

Appellee has not filed any brief and the record indicates no dispute upon any material question of fact. The plaintiff manufactured and sold beer etc. On or about September 14, 1914, one Gustave Edwards, purchased the goods from one Vretman. The property was located 900 to 908 Belmont avenue, at which place Vretman had theretofore conducted a business, under the name of the North Star Inn. At the same time, plaintiff leased to

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Edwards the said premises for a term of years, beginning September 14, 1914, to April 24, 1924, to be occupied as a saloon, restaurant and cafe. On the same date Gustave Edwards made a chattel mortgage, conveying the property in question to plaintiff to secure the indebtedness of \$6700. The mortgage was duly acknowledged and was recorded in the recorder's office of Cook County on September 16, 1914. By its terms it provided that the mortgagor, his heirs, etc. might retain possession of said goods and chattels, and keep and use the same until default should be made in the indebtedness, which was represented by notes to the amount of \$6700, payable three years after the date thereof.

On September 19, 1914, there was filed in the office of the recorder of Cook County, a certified copy of the charter of the North Star Inn Company, an Illinois corporation, which had been formed for the purpose of buying and selling wines, liquors and cigars, and delicatessen at wholesale and retail, and to operate a restaurant. Its capital stock was \$2500, which was subscribed for by Gustave Edwards and one Walter Blaufuss equally, and the property in question was transferred to the corporation in payment of its capital stock.

On September 8, 1915, the North Star Inn Company, a corporation, for a valuable consideration, made, executed and delivered its note of that date for the sum of \$500, and on the same date, in order to secure the same, made, executed and delivered to said Popp a chattel mortgage, conveying said property. This mortgage was duly acknowledged and filed for record on the 9th day of September, 1915. On January 4, 1916, said Albert M. Popp recovered a judgment against said North Star Inn Company for the sum of \$534.41 and costs, and on January 7, 1916, he sued out a writ of fiari facias against the North Star Inn Company, directed to defendant, and on January 7, 1916, the defendant, by virtue thereof, took and detained the chattels involved in this controversy. Plaintiff demanded the possession of the property

under the terms of its chattel mortgage, which was refused, whereupon it brought this suit.

The evidence affirmatively shows that the plaintiff at no time had actual notice that the North Star Inn Company, a corporation, was conducting the business where these goods and chattels were located. There had been no change in any of the signs about the place to indicate a change of ownership. Plaintiff was supplying the place with goods but at all times dealt with Edwards, and its accounts were carried on its books in the name of Edwards. The evidence also shows that the North Star Inn Company took the property by bill of sale, which expressly stated that the property was subject to chattel mortgage, and it is undisputed that the lease was never assigned by Edwards to the North Star Inn Company, a corporation, and he therefore remained in actual possession of the property.

On the undisputed facts plaintiff had a prior lien, and the rights of defendant and the parties under whom he claimed, were all subject to the right of plaintiff. The motion, therefore, of the plaintiff for a directed verdict in its favor should have been granted by the court and it was error to refuse it.

Dixon v. Smith Wallace Shoe Company, 283 Ill. 234; Woods v. Bowman, 200 Ill. App. 612; First State Bank of Pend Creek v. Clark, 202 Ill. App. 283.

The judgment will therefore be reversed and the cause remanded.

REVERSED AND REMANDED.

THE STATE OF NEW YORK, in SENATE,

January 15, 1884.

REPORT OF THE COMMISSIONERS OF THE LAND OFFICE.

ALBANY: PUBLISHED BY THE STATE OF NEW YORK, 1884.

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ALBANY: PUBLISHED BY THE STATE OF NEW YORK, 1884.

303 - 24654

215 I.A. 631

VAL BLATZ BREWING COMPANY,
a corporation,
Appellant,

vs.

ANTON J. CERNAK, Bailiff
of the Municipal Court
of Chicago,
Appellee.

Appeal from
Circuit Court,
Cook County.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

The facts material with reference to this case are the same as the facts stated in case No. 24653 in the opinion filed in that case.

For the reasons there stated, the judgment in this case will, as there, be reversed and the cause remanded.

REVERSED AND REMANDED.

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312 - 24663

IN THE MATTER OF THE ESTATE
OF GEORGE C. BENTON, deceased.

C. W. WARD, as executor,
Appellee.

vs.

CHICAGO TITLE & TRUST COMPANY,
Administrator of the estate of
HARRIOT B. WARD,
Appellant.

Appeal from

Circuit Court,

Cook County.

215 I.A. 631

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

Appellant was the claimant below in the Circuit Court on appeal from the Probate Court of Cook County, and now appeals from a judgment for \$3,400 in its favor, entered by the court upon the verdict of a jury.

The claim was, first, for the alleged conversion by George C. Benton on February 28, 1898, of 350 shares of stock of the Delta & Pine Land Co. of the value of \$70,000; second, for the conversion by him on November 23, 1898, of 25 shares of stock of the Chicago, Title & Trust Company ^{of the} value of \$3,500. All of this stock is alleged to have been the property of his daughter, Harriot Benton Ward.

Special interrogatories were submitted to the jury, and from the answers it appears that the verdict for claimant was based on the claim of the Chicago, Title & Trust Company stock, and that, as to the Delta & Pine Land Company stock, its finding was for defendant.

Many alleged errors have been argued by the claimant, and defendant appellee has also assigned cross-errors, both challenging the sufficiency of the evidence.

We find the record before us, however, in a condition which prevents consideration of these points for the reason that neither from the certificate of the trial judge nor other-

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wise it is made to appear that the bill of exceptions contains all the evidence. Gulliner v. Nash, 76 Ill. 515; Hyatt v. Alexander, 126 Ill. App. 207.

Claimant cites us to Hill v. Chicago City Ry. Co., 126 Ill. App. 152, and urges that the record before us may be held to show all the evidence under the ruling there announced. We do not think so, and are therefore limited to the consideration of errors assigned and argued upon the refusal of the court to permit the introduction of evidence, which, with other evidence, tended to prove any of the issues of the case and other questions of law, raised by the giving and refusing of instructions applicable on the evidence before us. Benson v. Letz, 75 Ill. 371; Ill. Cent. R. R. Co. v. O'Keefe, 154 Ill. 506; Loeb v. Alexander, 174 Ill. App. 143.

The material facts, in so far as the same are before us, appear to be that Harriot Benton Ward, of whose estate claimant is administrator, was the daughter of George C. Benton, against whose estate the claim is filed. She was also the wife of Dr. Charles A. Ward, to whom she was married in June 1894, and who is one of the executors of the will of George C. Benton. She died April 18, 1896, leaving her said husband and an infant daughter, Harriot C., her only heirs at law and next of kin.

George C. Benton, the father, was twice married, and Mrs. Ward was born of the first marriage. The second wife was Susan D. Benton, with whom he lived prior to and at his death, which took place July 26, 1902. She, with the infant granddaughter, survived him.

At the time of the transactions alleged, he supposed himself to be worth more than \$100,000 over and above all his liabilities. He was, in fact, worth a much larger sum. He was the principal stockholder, and apparently dominated and controlled

the Delta & Pine Lands Company, the principal assets of which were some 250,000 acres of land, situated in Mississippi. The corporation was incorporated under the laws of that state.

His wife, Susan D. was previously married, and had a son by said marriage who was living. No children were born to George C. Benton from his marriage with his second wife, Susan D. Benton. Dr. Charles W. Ward and his friend Dr. Merriman were named executors of his will and qualified. Dr. Merriman died prior to the trial in the Circuit Court, but his testimony, (in so far as the same was held to be admissible), as given in the Probate Court on the trial of the same issues there, was read in evidence.

The claimant's title to this 350 shares of stock was based on a supposed gift of it to Harriot J. Benton Ward by George C. Benton on or about November 12th, 1895. It does not seem to be controverted that on November 12, 1895, he, being already the owner of 2576 shares of stock in the company, purchased 350 additional shares; that the entire consideration for the purchase of said additional shares was furnished by him; that he, nevertheless, caused the certificates representing this stock to be issued in the name of his said daughter, Harriot J. Benton Ward, and that the same was placed in her name on the books of the company.

He, however, at all times thereafter, retained the possession, dominion and control of said certificates. They were never in the possession of his said daughter, nor ever further placed in her possession or control. It further appears that after the death of Mrs. Ward on or about February 25, 1898, George C. Benton signed her name to the power of attorney on the back of each of the certificates, and procured the same to be transferred to himself on the books of the company. This is

the act, which it is urged constituted the alleged conversion.

The theory of complainant is that the legal title to the stock passed to Mrs. Ward by the transfer on the books of the company, and that the relationship of father and daughter raised a prima facie legal presumption of a gift to the daughter by the father, and that proof of these facts cast upon defendant the burden of showing that George C. Benton did not hold said certificates as trustee for Mrs. Ward. The defendant, on the contrary, contends that the gift to Harriot J. Benton Ward was never completed, because, it was never, in fact, delivered; George C. Benton not having released dominion and control over the property at any time.

Both father and daughter having passed away, and both Dr. Ward and Dr. Merriman, (as we think, properly) being held incompetent witnesses to the actual transaction of November 12, 1895, and no other witnesses, apparently, being familiar with the facts, all facts and circumstances from which the intention of George C. Benton might be inferred, became very important and material testimony.

In the course of the trial, the claimant offered in evidence certain trial balances, beginning January 1, 1893, and running to August 10, 1898, as shown by the ledger of George C. Benton. These trial balances were in his personal handwriting, and purported to show his investments in the Delta & Pine Lands Company stock. They showed that these investments, during the period from November 1, 1893, to and including January 3, 1896, stood at the sum of \$56,783.03. The trial balance of January 3, 1895, was admitted in evidence. The others, when offered, were objected to by defendant and excluded by the court. We think these trial balances were competent and material evidence, and should have been admitted.

The claimant also urges as error, the giving of that part of instruction number 24, which told the jury that, -

"They must take into consideration the acts, if any, of the said George C. Benton, at and subsequent to the time said stock was issued, as disclosed by the evidence herein, and if you believe from the evidence, that by any act or acts of the said George C. Benton, after the issuing of said stock, he evidenced an intention to retain control of the same for any purpose whatever, then you must consider such acts, if any, in arriving at a verdict, as to whether or not it was his intention to make such a gift of such stock."

We think this instruction as given might mislead the jury. If the jury believed a valid delivery of the stock had been made to Mrs. Ward at or subsequent to the time the stock was registered in her name, then any act by George C. Benton thereafter, indicating an intention to retain control of it, would be wholly immaterial.

With reference to the transfer of stock to Mrs. Ward, instruction number 20 told the jury that unless George C. Benton "at the time the same was issued in her name, intended to give said stock to her absolutely, claimant was not entitled to recover." This was also, we think, erroneous. Proof of his intention to make a gift of the stock should not have been limited to the time the certificates were issued in her name.

For the errors indicated the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

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F. P. SMITH, doing business
as The F. P. Smith Iron &
Iron Works,

Appellee,

vs.

ART METAL CONSTRUCTION
COMPANY, a corporation,
Appellant.

Appeal from

Circuit Court,

Cook County.

215 I.A. 631

MR. PRESIDING JUSTICE HATCHETT
DELIVERED THE OPINION OF THE COURT.

The appellant, who was defendant below, has its factory and principal place of business at Jamestown, New York. The defendant, appellee, is a manufacturer of ornamental iron, wire and bronze at Chicago, Illinois.

The defendant had a contract to make certain improvements in the courthouse at Cleveland, Ohio. It corresponded with plaintiff with reference to furnishing part of the material and work, and, as a result of their negotiations, on September 19, 1910, a subcontract was made with the plaintiff.

Article 1 of the agreement provided that plaintiff, "The subcontractor shall and will provide all the materials and perform all the work for the two sets of stairs complete, including risers, treads, platforms, railings, newel posts etc., but without wood handrail and two railings and facias for two well holes complete, all as shown by blue prints, * * * " as provided in the specifications of the architects. The consideration was stated to be \$1463.00, less an allowance of \$30.00 for bent plates and moldings, and was to be "delivered and set complete in the Cuyahoga County Court House, Cleveland, Ohio, to the entire satisfaction of the architects and Court House Commissioners."

The plaintiff immediately began work on the subcontract, and the parties continuously corresponded with each other in

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reference thereto.

On November 21, 1910, defendant wrote plaintiff it had "decided that all of this work must come here to Jamestown, N. Y. instead of going direct to Cleveland. You will, therefore, issue the proper instructions to have this come here when ready, you to prepare the work ready for finishing, but do not finish it - we will do the japanning here. We will, however, ask you to apply a protective coat of some kind to this work, so that it will not rust in transit. We would further advise that we will also erect same in Cleveland.* * " The letter also included specifications to apply, and concluded, "As we have made arrangements with you to furnish this work delivered and erected in the court house at Cleveland, O., and it now being necessary to have it come here, unfinished, and be erected by this company, we will ask you to let us have by return mail your best price for furnishing this order f. o. b., Chicago, Ill., instead of delivered and erected at Cleveland. Also advise us when you will be able to make shipment. * * " On December 2nd, the plaintiff replied, "We beg to report that this work is practically completed in our factory, * *. You cannot expect the specifications noted in your letter to apply to this work now. Possibly, it is all right as it is, and we suggest, if possible, to have one of your Chicago representatives examine the work at our factory. If further polishing, filing, etc., should be required for enameling, we would have to charge for the additional work, and cannot quote price f. o. b. Chicago, until we know what will be required. * * ." December 13th, 1910, defendant replied, "The suggestion to have one of our representatives examine the work at your factory may be taken up, but first we would like an answer to this letter. We might say that we cannot see any reason why the work should not pretty closely conform to the specifications. * * On receipt of your reply, we will then be able to determine whether it will be necessary to send someone to your factory to make an inspection or not. * * "

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A few days thereafter, Mr. C. E. Strong, representing defendant, came to Chicago, and made an examination of the work. There is some conflict in the testimony as to just what took place, but the evidence for plaintiff shows that he examined the work as completed, made certain suggestions as to changes in it, which were agreed to by plaintiff, and it is undisputed, as we understand the evidence, that substantial modifications of the existing contract were agreed upon.

A deduction of \$189 was made from the contract price, on account of the great benefit to plaintiff of being released from erecting the stairs at Cleveland, O. A further reduction of \$22.00 was made as an allowance for freight to Cleveland, and since risers were not to be furnished, a deduction of \$30.00 on that account.

On the other hand, the defendant agreed to pay the sum of \$80.00 additional as a price of certain grinding which Mr. Strong desired to have done, in order to meet the requirements of the original specifications. Some defects in the work were pointed out, and it was agreed that they should be remedied in ways directed by Strong.

The evidence for plaintiff further showed that all this was done as directed, and that Strong, in behalf of defendant, agreed that when so done, the work would be passed by the commissioners at Cleveland. Testimony was also introduced for plaintiff, and is uncontradicted, to the effect that defendant by some mistake had originally directed a painted cast iron job, instead of a polished, enameled one as called for by the specifications, which defendant had never, in fact delivered to plaintiff before the completion of the work.

While there is some conflict as to the facts hereinbefore set forth, the jury has settled these facts in favor of the plaintiff, and appellant does not argue that their verdict is contrary to the manifest weight of the evidence. It does, how-

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ever, contend that Strong was only a special agent, and without power to change the original contract, and when the evidence of plaintiff, as to the arrangement made with him was submitted, objected to it upon the ground that Strong had no authority to bind the company. This seems to be the controlling question in the case. We think, however, that this question, too, was submitted to the jury, under instructions of which appellant does not complain, and we are also inclined to think that the evidence was properly admitted, and the jury justified in its verdict.

The position held by Strong with defendant was that of purchasing agent, and he had held the position for several years. He was under the direct control of Mr. Gilbert, the treasurer of the company, and consulted with him from time to time. He did not, however, submit all matters to him before acting. The entire correspondence between the plaintiff and defendant was conducted by Mr. Strong in defendant's behalf, and his initials appear upon each of the letters of defendant which is in controversy.

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The visit of Mr. Strong to was in response to the written request of the plaintiff, and upon his return to Jamestown, N. Y. in the usual course of his business, he wrote letters for defendant to plaintiff concerning this matter, which show very clearly that the defendant thought the original contract had been modified and changed.

We do not think the question of whether he was a general or special agent is of controlling importance. Whether we regard his agency as general or special, we think the defendant appellant was bound by the apparent authority conferred upon him, and that the jury was justified in finding as it must have found, that he had authority, in fact, to act for defendant in the modification of the terms of the old contract and in passing upon the question of the acceptability of the manufactured goods. As is

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said in Mechem on Agency, Vol. 1, p. 520, "The principal is bound to third persons who have acted in good faith and in justifiable ignorance of any limitations or restrictions, by the authority he has, apparently, given to the agent, and not by the express or declared authority where that differs from the apparent, and this, too, whether the agency be a general or a special one." Griggs v. Selden, 58 Vt. 561; Thurber v. Anderson, 88 Ill. 167; Aetna Insurance Co. v. McGuire, 51 Ill. 342.

The judgment will be affirmed.

AFFIRMED.

346 - 24698

FREDERICK HILDMANN,
Appellee,

vs.

GEORGE H. SERRY et al.,
Appellants.

)
Appeal from
Circuit Court,
Cook County.

215 I.A. 631

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by certain defendants from a decree of the Circuit Court of Cook County. The decree was entered upon the report of a Master in Chancery, to whom the cause had been referred. Defendants' exceptions to that report were ^{overruled,} and a decree entered according to its findings and recommendations. For many reasons this court might very properly affirm the decree without any review of the record on the merits.

In the first place, the transcript of the record which consists of several volumes, containing nearly two thousand pages, is incomplete, in that, as to one volume, the original record, being a volume supplied by the trial court, in place of an original volume which was lost, has been filed in this court as a part of the transcript, without any stipulation of the parties. The supplied copy is a part of the original record of the Circuit Court. It should remain in the office of the clerk of that court. Beth Hamidrash etc. Congregation v. Oakwood Cemetery Assn., 200 Ill. 480. In this state of the record, the presumption is that the evidence is sufficient to support the decree. Allen v. Henn, 97 Ill. App. 378.

In the next place the abstract presented by appellant is wholly insufficient. Rule 18 of this court seems to have been entirely disregarded in the preparation of it. In no

sense is it "a complete abstract" as required by that rule. It appears from it that the decree was entered February 26, 1918; that it overruled defendants' objections and approved the Master's report. Its contents are not further stated, nor is there any marginal reference to the page of the record where it may be found. After diligent search it was discovered, a typewritten document of several pages. Rule 18 provides the abstract shall contain a complete index, alphabetically arranged, giving the page where each paper or exhibit may be found, with the names of the witnesses, and the pages of the direct, cross and re-direct examination. The entire testimony of several witnesses is omitted from abstract and index. Although there appear to be many important exhibits, not one of them is mentioned in the index.

The exceptions to the Master's report filed by appellant were twenty-six in number, covering about twenty printed pages, As a sample of them we take the first, "Said Master arbitrarily disregarded, ignored, refused and failed to consider and give due and proper consideration, weight and credence to material testimony, given on hearing said cause before him on behalf of defendants, and each and either of them, through disinterested, competent and credible witnesses, and likewise given undue regard, unwarranted consideration and improper weight to testimony of interested witnesses for the complainant of questionable competency." Just how the trial court could be expected to pass on exceptions of this general nature to a Master's report we cannot see.

To do so, it would be necessary to search the whole record. Such a practice has been well called "intolerable" and condemned as making a Master's report worse than useless to the court. The trial court may have very properly declined to enter upon such a voyage of discovery, without chart or compass, as was well said by Judge Gary of a somewhat similar record in

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Huling v. Farsell, 33 Ill. App. 238.

While these reasons would justify an affirmance of the decree, we have, in spite of these disadvantages, examined with some care, the pleadings and the testimony of the witnesses, the report of the Master, the decree of the court and the authorities cited, and are of the opinion that the decree on its merits should be affirmed.

The facts seem to be that on January 10, 1905, one H. C. Adair and complainant Hildmann with others, incorporated the H. C. Adair Printing Company, under the laws of Illinois, with a capital stock of \$50,000, divided into 5,000 shares of the par value of \$10 each. On September 12, 1913, the name of the corporation was changed to the "Hildmann Printing Company." The defendants, appellants, thereafter became stockholders in the corporation. August 19, 1913, Adair and complainant Hildmann, entered into a contract, whereby Adair agreed to sell and Hildmann to buy 1650 shares of the stock, and by the terms of the contract, Hildmann agreed to use his best endeavors to eliminate the name of Adair from the corporation. If he could not do this, however, it was agreed it would not change his rights under the contract. Apparently he could not without the help of defendant, George H. Seery, who also owned considerable stock in the company. And, as a result, a contract was made on September 11, 1913, from which it appears that Hildmann then held 2111 $\frac{1}{2}$ shares, George H. Seery 1080 shares, Thomas H. Seery 300 shares of the stock. The stated purpose of the contract was to provide that neither party should own or control more stock in the company than the other. To that end it was provided that 52 $\frac{1}{2}$ shares, standing in the name of W. N. Lane, should be deposited in escrow with George H. Seery, but that he should only have the power to vote said stock upon written consent of George H. Seery and complainant Hildmann. To this Lane consented, in a writing attached to the contract, and signed by him under his seal, in which he agreed that the stock was deposited;

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"subject to the terms of above agreement" and the substance of this writing was endorsed upon Lane's certificate of stock, and thus endorsed, it was delivered to George H. Seery. A new certificate was thereafter issued and delivered to George H. Seery, from which this endorsement was omitted.

The contract provided that 731½ shares of the Adair stock was to be delivered to George H. Seery, who told Hildmann that his father Thomas H. Seery, would loan him the money to pay for it. But when the parties met to sign the contract, Thomas H. refused to do this, unless a certificate of stock was made out in his name, which was accordingly done. While Thomas H. did not sign the contract, he had full knowledge of all of its terms, and knew of the purpose expressed therein; that the stock of the company should be so held; that neither complainant nor George H. Seery should be able to control the corporation without the consent of the other. And to that end, the contract further provided, that stock in the treasury of the corporation should not be sold without their joint written consent, and, "if any further stock is bought by said Hildmann or Seery, then other party to agreement shall have right to pay for and receive one half thereof on same terms as stock shall have been purchased."

The Master finds, and a preponderance of the evidence sustains the finding, that George H. Seery confederating with Lane and Thomas H. Seery, materially breached this agreement by the sale of 50 shares of Lane's stock to one Kuensting, the purchase of 150 shares by George H. Seery from his father Thomas H. Seery, the purchase by Thomas H. from Kuensting of the 50 shares Kuensting had purchased from Lane. In this manner George H. Seery acquired an advantage of 50 shares over Hildmann in the control of the company, and at a meeting of the stockholders held June 10, 1914, the two Seerys and Lane were elected directors, constituting a majority of the board of five. They met immediately afterwards,

and elected Lane chairman of the meeting, in which complainant did not participate, and fixed salaries for themselves, agreeable to themselves, and then adjourned.

It seems that the certificate for 52½ shares of stock should have been for 47½ shares. The amount was made 52½ by a mistake of fact. The Master found that Thomas H. Seery took the shares from Kuensting with notice of the equity attaching to it, and that, in equity, George H. Seery was bound to sell to the complainant 25 shares thereof, upon the same terms on which he had purchased it; that both George H. Seery and complainant should be required to transfer to the corporation the 2½ shares which had been issued under mistake of fact; and that Lane should be required to deliver up to the corporation the 2½ shares held by him, and that the proceedings of the stockholders' and directors' meeting should be set aside.

The appellants first contend that the doctrine of equitable estoppel could not be invoked against Thomas H. Seery, so as to make him a party to the contract between George H. Seery and complainant. The conclusive reply to this we think is, that the decree is not based on that theory. On the contrary, it grants what amounts to specific performance of the contract against George H. Seery, which we think was abundantly justified under the facts. Hills v. McMunn, 232 Ill. 488.

It is next contended that Lane's agreement was without consideration. We do not think so. It was made and delivered at the same time as the original contract, and the promises of one was the consideration for the promises of the other. It is next contended that it was illegal in that it purported to take from Lane power to revoke his proxy and sell his stock. On this point appellants rely on Luthy v. Ream, 270 Ill. 170. We do not think the facts here, are at all analagous to the facts of that case. The agreement here provided for the control of the affairs of the corporation by a majority of the stock, and for the benefit, apparently, of

the second was taken in the month of June, 1881, and was found to be a new species, and was named *Leptocryptus*.

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The twenty-ninth was taken in the month of September, 1883, and was found to be a new species, and was named *Leptocryptus*.

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the corporation. This was permissible and legal under the rule laid down in Thompson v. Thompson Carnation Co., 279 Ill. 54. But however this may be, it was clearly made to appear from the evidence that the 2½ shares of stock which were held by Lane was an overissue through a mistake of fact, and the decree very properly directed it should be cancelled.

We think the decree is just upon the merits and it will be affirmed.

AFFIRMED.

MIDLAND AUTOMOBILE COMPANY,
a corporation.

V23.

SUNBEAM CHEMICAL COMPANY,
a corporation.

Appellant.

Appeal from Municipal Court
of Chicago.

215 LA 532

This is an appeal by the defendant from a judgment for plaintiff in the sum of \$300 entered upon the verdict of a jury.

The plaintiff's statement of claim alleged that it assigned and transferred to defendant its lease on certain premises in the City of Chicago; that defendant accepted the same, and assumed and agreed to pay the rent for the balance of the term, and that, at the time of the transfer and surrender of said lease, plaintiff had certain fixtures and an elevator in the building which it had installed therein; that for a consideration of \$300, plaintiff agreed to permit said fixtures and elevator to remain in said premises.

The affidavit of merits, "admits that the plaintiff assigned and transferred its said lease for the said premises for the balance of the term; to-wit, from September 17th to September 30th, 1917, in consideration of the payment by defendant to the plaintiff, of the sum of \$60, which sum was duly paid by defendant to plaintiff, and accepted by the plaintiff, that no other ^{or} further consideration was agreed upon by plaintiff, and defendant for said assignment and transfer of said lease. That at the time of the transfer and surrender of said lease by plaintiff to defendant, there were in said premises sundry fixtures and an elevator, but that said fixtures and elevator were a part of said leased premises and were not the property of plaintiff, but were the property of plaintiff's lessor of said premises * * "; that said lease was assigned * *

not in consideration of
surrendered / plaintiff's alleged agreement to permit the fixtures
and elevator to remain, but ^{only} in consideration of the payment of \$60.

The parties offered evidence tending to sustain their respective contentions. It appeared that the Midland Automobile Company had a lease which was about to expire, and it put the building in the hands of one Dressel for leasing; that in the latter part of August, Mr. Huffman and Mr. Tebbits representing the defendant, opened negotiations with him in regard thereto. The evidence for plaintiff tended to show that \$300 was to be paid for the assignment of the lease, delivery of possession, and the agreement that these fixtures, which had been placed in the premises by plaintiff, should be permitted to remain therein. Dressel and Cahn testified to this effect, while Huffman says the talk of \$300 was in the way of an agreement for the sale of the fixtures; that it was afterwards ascertained that the lessor would not permit removal of the elevator at the end of the lease, and the sale was never consummated.

It is not denied that a list of the fixtures which were to be taken out of the premises, was made and given to Huffman, and that the remainder of these things thereafter remained upon the premises, and were used by the defendant company. It is also undisputed that plaintiff gave defendant possession of these premises.

Tebbits, who was present at the conversation, representing defendant with Huffman, did not testify, although the evidence shows he was available, and we think under these circumstances, the jury was abundantly justified in finding, as it evidently did, that the real transaction was attested to by plaintiff's witnesses.

It is claimed one of the instructions is defective, because it assumes a contract was, in fact, made. However, the evidence for both parties showed the making of a contract, and construing defendant's pleadings, as we must, most strongly

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against it, we think it admits that fact.

Objection is also made that the instruction assumes that the contract was signed, whereas, the evidence for both parties shows it was oral. This was an inadvertence, but we cannot see how the jury could have been misled or defendant injured by it.

We do not think there is any substantial error, and are satisfied that on the facts the judgment is just. It will therefore be affirmed.

AFFIRMED.

395 - 24748

FELICIE M. MODJESKI,

Appellee,

vs.

RALPH MODJESKI,

Appellant.

Appeal from

Superior Court,

Cook County.

} 215 I.A. 632

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This cause was before this court on a former appeal, and a decree which dismissed ^{complainant's} bill for want of equity, was reversed and the cause remanded, with directions to hear the evidence as to expenses, solicitors' fees and proper allowance for support, and for other proceedings in conformity with the views expressed in the opinion. Modjeski v. Modjeski, 209 Ill. App. 212.

Further evidence was heard as directed and a decree entered, granting the plaintiff separate maintenance and awarding her the sum of \$250 per month as permanent alimony, and directing that the defendant pay her \$5,500 in addition to \$500 theretofore paid as solicitors' fees. The decree also allowed other expenses of suit amounting to \$747.10.

The defendant has assigned as errors the judgment of this court on the former appeal, and that the chancellor entered a decree for separate maintenance. The decree, as entered, is in conformity with the views of this court as expressed in the former opinion, and the judgment of this court thereby has become the law of this case. We have no power to change it, and we are further of the opinion that it ought not to be changed, even if we had the power.

It is also claimed by defendant, that the allowance for maintenance and solicitors' fees is excessive. He also

1891

objects to the expense item allowed, amounting to \$210, which was incurred for the attendance of a stenographer for complainant upon the original trial.

The complainant has assigned cross errors, alleging that the respective amounts allowed for maintenance and solicitors' fees are inadequate. Further, that the court erred in failing to allow solicitors' fees for the defense of a suit for divorce, brought by defendant against complainant in the State of Oregon, and in failing to allow other items claimed. These alleged errors and cross errors we may properly consider.

The evidence shows that complainant is worth between \$150,000 and \$200,000 over and above all his liabilities; that he is by profession a railroad engineer; that his professional standing is very high. His counsel stated upon the hearing " * * I will even go far enough to admit that he probably is as well or better known than any bridge builder in the United States that builds form railroads." His average net annual income for the seven years prior to the entry of the decree was \$39,124.31 per annum. His income from real and personal estate is \$5,875 per annum. Defendant produced an estimate of his business for the year 1918, indicating that it might be run at a loss. For several months prior to the hearing, there had been much less than the usual demand for his professional services. He says he thinks this was caused by war conditions, and that it will continue so long as the railroads are run by the government. However, his estimate for business expenses for the year 1918 does not differ materially from the expenses of previous years. We think the income actually earned would control, rather than defendant's estimate of what the income would be in the future. It will, we think, usually be found that defendants in cases of this kind are disposed to take a rather melancholy view of future financial income. While the decree finds "that for the present year, it

appears that the business may be operated at a loss," we do not understand that the court based its finding as to the amount of alimony allowed upon this fact to the exclusion of net income actually earned during the years immediately preceding.

We do not think the rule announced in Harding v. Harding, 144 Ill. 588, to the effect that where payment of the allowance will diminish the estate from which the income is derived the amount must be limited to actual wants and necessities, is applicable to the facts of this case, as the complainant contends it is.

Previous to this litigation defendant provided complainant with \$400 to \$450 per month. The temporary alimony allowed was \$350 per month. Just prior to filing this bill he voluntarily paid her \$150 per month. After the dismissal of the bill he paid her \$175 per month. She has a separate estate of six or seven thousand dollars. He now lives in an apartment for which he pays \$125 per month. At the time the family lived together in Chicago, its expenses, as she claims were more than \$750 per month. He admits they were at least \$450 per month.

The defendant does not seem to have curtailed his personal expenses which are about \$10,000 per annum, including therein, however, more than \$18,000 which has been expended by him, exclusive of alimony paid to complainant, for his expenses in connection with this litigation.

It affirmatively appears in the record, undisputed in fact, that through his agent he offered the complainant, first, the sum of \$50,000 if she would consent to a secret divorce, and that, later, he raised this offer to \$100,000. Each case of this kind must be decided on its own particular facts. It is to be noted that the value of the dollar has much depreciated during the last few years, when measured in the amount of the necessities of life it will purchase.

We are inclined, under all the circumstances, to

regard the sum allowed for alimony as somewhat low, but in view of the fact that defendant's income has been influenced by war conditions, we do not think the finding of the chancellor should, at this time, be disturbed. When we consider the station of the parties in society, the previous mode of living, the present ability to pay, we cannot say that the decree is manifestly wrong in this respect.

Nor do we think that the court erred as to the amount allowed for solicitors' fees. Mr. Davis, expert, called as a witness for defendant, placed the value of these services at from \$4,500 to \$5,000. The experts called for defendant placed their value at from \$8,500 to \$10,000. The fact that complainant's bill was dismissed by the chancellor on the first hearing and that complainant's attorney did all the work necessary to have the case reviewed by the Appellate Court, practically on the basis of a contingent fee, is a matter, which should, we think, be taken into consideration. The testimony shows that the solicitor for the complainant spent about ninety days time upon the case. We think the allowance was reasonable under all the circumstances. Harding v. Harding, 180 Ill. 481; Cooper v. Cooper, 185 Ill. 163.

Nor do we think the allowance by the court of the item for attendance of a stenographer upon the first trial was error. Indeed, this was, as we view it, a necessary expense of that litigation.

We also think the court properly refused to allow solicitors' fees incurred by complainant in connection with the trial in Oregon. Such expenses we think, are not within the purview of our separate maintenance statute. Nor do we think the disallowance of other items was error when we consider that complainant had some separate estate of her own.

For the reasons indicated the decree of the Superior Court will be affirmed.

AFFIRMED.

401 - 24754

HEDWIG BIESCHKE,
Appellee.

vs.

CHICAGO RAILWAYS COMPANY et al.,
On Appeal of CHICAGO RECORD HERALD
COMPANY,
Appellant.

Appeal from

Circuit Court,

Cook County.

402 - 24355

HEDWIG BIESCHKE,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY et al.,
On Appeal of CHICAGO RAILWAYS
COMPANY,
Appellant.

215 I.A. 632

MR. PRESIDING JUSTICE HATCHETT
DELIVERED THE OPINION OF THE COURT.

These are separate appeals (consolidated here) by two defendants from a judgment in favor of plaintiff in an action brought for personal injuries.

The declaration of plaintiff alleges that on October 5, 1915, she was a passenger on a north bound car of the defendant Railways Company; that she signalled the car to stop at Byron street; that the Railways Company stopped the car in a negligent manner, and that, at the same time and place, the defendant, Chicago Record Herald Company, was driving an automobile upon said street, and that while in the exercise of due care, she was run into and knocked down by the automobile, by reason of the joint negligence of the defendants.

In her second count she set up an ordinance of the City of Chicago, requiring the operators of street cars to stop at the nearest crossing in the direction the car was going, and another, requiring drivers of vehicles, upon overtaking any street car stopped for the purpose of discharging passengers,

not to pass or approach within ten feet of the car. It further charged violation of these ordinances by the defendants respectively, by means whereof she was injured.

The defendants filed the general issue and the Herald Company filed a special plea, denying ownership and control of the automobile. It, however, offered no evidence in support of the plea, but at the conclusion of plaintiff's evidence, made a motion for a directed verdict, which was denied, and it thereupon refused to offer further evidence in its own behalf. The plaintiff contends that the special plea was insufficient, but whether this be true or not, we think the evidence for plaintiff showed a prima facie case on that issue, which was not rebutted, and that the jury was justified in finding that the automobile was owned, possessed and controlled by defendant. It is further argued by both defendants that the evidence failed to establish negligence as to either of them, and defendant Railways Company strenuously contends that plaintiff was guilty of contributory negligence, which would bar her recovery.

There was, we think, evidence from which the jury could reasonably find that the street car was stopped on the wrong side of the street, contrary to the request of plaintiff, and that almost immediately after she alighted, she was struck by the automobile, which was being driven at a speed of about twenty miles an hour. We think that the jury was justified in finding the defendants guilty of negligence which proximately tended to cause the injury, and that it was also justified in finding that the plaintiff was in the exercise of due care.

Defendants, however, further assign and argue error on account of instructions given at plaintiff's request. Instruction number 10 properly told the jury that if it should find from the evidence that both defendants were guilty of negligence which was the proximate cause of the injury to

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plaintiff as set forth in the declaration, that plaintiff was so injured and was not guilty of contributory negligence, it should find a verdict against both defendants, and continued, "if you should find from the preponderance of the evidence that only one of the defendants was guilty of the negligence which was the proximate cause of the injuries to the plaintiff as complained of in the declaration herein, if you should find from the preponderance of the evidence that the plaintiff sustained such injuries and that she was exercising due care for her own safety, then your verdict should be for the plaintiff and against the said defendant whose negligence was the proximate cause of the injury complained of and sustained by the plaintiff." This part of the instruction was, we think, clearly erroneous in that it assumed that one of the defendants was guilty of negligence.

Plaintiff's instruction number 11 as to damages is also subject to criticism for the reason set forth in I. C. R. R. Co. v. Johnson, 221 Ill. 42. Instruction number 12 told the jury that it was not necessary that any witness should have expressed an opinion as to the amount of damages, "but the jury may themselves make such estimate from the facts and circumstances in proof." This instruction would be correct if limited to damages such as pain and suffering, but is incorrect, where, as here, there were claimed elements of damages capable of exact proof.

We think also, there was error in the admission of certain parts of plaintiff's expert evidence which we will not discuss at length. Kimbrough v. Chicago City Rys. Co., 272 Ill. 71.

For the errors indicated the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

4

BARNEY KLUEMANN,
Appellee.

vs.

EDMUND A. MOHAN,
Appellant.

Appeal from
Municipal Court
of Chicago.

215 I.A. 632

On April 19, 1918, plaintiff filed a statement of claim, alleging that he was employed by the defendant as a carpenter from March, 1909, to December, 1915, and that there was an unpaid balance due to him from the defendant for such services amounting to \$175.05. An itemized statement of account was attached showing in detail charges amounting to the sum of \$1,015.05, and credits on account of payments made, amounting to the sum of \$840. The respective dates of each item charged and credits given were also stated.

The court found for the plaintiff in the full amount of balance claimed and entered judgment therefor.

Appellant has argued here in the first place that the court erred in its interpretation of the Statute of Limitations. As argued the question presented is one of law and there were no propositions of law submitted by either party to be held as law by the court and the question does not arise on any ruling of the court. We are therefore

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limited to the consideration of errors assigned and argued as to the rulings on the admissibility of evidence and whether the evidence sustains the finding and judgment. Mutual Protective League v. McKee, 223 Ill. 364; Armstrong & Co. v. Barrett, 46 Ill. App. 193; Flood v. Leonard, 44 Ill. App. 113; Bredhoff et al. v. Lepman et al., 181 Ill. App. 247; Mullin v. Johnson, 98 Ill. App. 621; Jacobson v. Liverpool, London & G. Ins. Co., 231 Ill. 61.

No errors are assigned and argued as to the rulings of the court on the admissibility of evidence, and defendant does not as we understand it contend that the finding is against the evidence otherwise than on the issue of payment. The plaintiff admits that defendant is entitled to an additional credit for a check of \$50.00 dated March 13, 1912, which was received and cashed by the plaintiff.

Plaintiff also admitted by his pleadings a payment made in August, 1914, of \$35. In the exhibits in evidence is a check dated July 25, 1914, for the sum of \$35, which the endorsements thereon show was collected by plaintiff July 31, 1914, which we think represents this item. Plaintiff testified upon the hearing that he was sure he had received \$35 in cash from the defendant and we therefore think this amount should be allowed as an additional credit. Another item of \$50 is claimed but the evidence with reference thereto is not clear and convincing. The burden of proof is on defendant on the issue of payment. We think the defendant is entitled to total additional credits in the sum of \$85 and the balance due should have been found to be \$90.05.

If, therefore, the plaintiff, appellee, will within ten days from the filing of this opinion enter a remittitur of \$85 from the amount of said judgment it will be affirmed for the amount of \$90.05, otherwise reversed and remanded.

AFFIRMED UPON REMITTITUR OTHERWISE REVERSED AND REMANDED.

143 - 24450

EDWARD D. HOWLAND et al.,
Plaintiffs in Error,

vs.

ATWELL PRINTING & BINDING COMPANY,
an Illinois corporation, et al.,
Defendants in Error.

Error to
Circuit Court,
Cook County.

215 I.A. 633

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This was a bill filed by plaintiffs in error as minority stock holders under Sec. 25 of the Corporation Act of 1872 as amended in 1877, for the dissolution of the Atwell Printing & Binding Company, an Illinois corporation, and for other relief. On a hearing of the issues before the chancellor the bill was dismissed for want of equity.

All of the parties recognized that complainants' right to any relief depends primarily on whether they were bona fide stock holders of said Illinois corporation. If the dismissal of the bill was justified by evidence tending to show that they were not, then we need consider no other question.

Geo. M. Atwell, one of the defendants, was president and owned most of the stock of said Illinois corporation (referred to herein as the Atwell Company). He became interested in organizing the "Newspaper Magazines Corporation" (referred to herein as the Newspaper Company) to publish a magazine to be used as a supplement to Sunday newspapers in forming which the subscribers received with each 3 shares of its stock 1 share of the Atwell Company's stock which said Geo. M. Atwell caused to be issued to them, and across which were stamped or printed the words "10 per cent per annum guaranteed". Complainants contended that they thereby became absolute owners of the Atwell

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182 - 183

182 - 183

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Company's stock so issued to them, and defendants that said stock was to be held by complainants merely as security for the continued solvency of the Newspaper Company so long as they were stock holders therein. While we think the great weight of the evidence sustains the latter contention, yet it is unnecessary to dwell upon that feature of the case, if, as we also think, the evidence clearly sustains the further contention of defendants in error that all the stockholders of the Newspaper Company, including complainants, subsequently entered into an agreement with said Atwell to surrender such stock to him for a consideration, which was fully executed on his part.

The Newspaper Company was organized in 1907. Towards the end of 1908 it had about reached the end of its resources, whereupon a meeting of its stock holders was had to consider a proposition of another corporation, the Literary Magazines Corporation, (hereinafter referred to as the Literary Company) to purchase the assets of the Newspaper Company for \$10,000 cash and 200 shares of its stock. At that meeting an agreement for a sale upon those terms was effected. At the same meeting and apparently as a condition of Atwell's consent to the acceptance of such proposition, he made a proposition in effect, - as testified to by six of defendants' witnesses present at the meeting, - that they should take the Literary Company's stock at par equal to their original investment in exchange for their Newspaper and Atwell stock to be returned to him in consideration of his assuming the indebtedness of the Newspaper Company amounting to several thousand dollars and paying them the 10 per cent guaranteed on the face of the Atwell stock up to the date of the Transfer to the Literary Company. These witnesses said that both propositions were embraced in one motion that was unanimously carried. All agreed that something of this kind was discussed at such meeting and that a motion was put. But complainants Edward Howland and his wife Maude

testified that while a motion was put no definite action was taken thereon. Complainant Warfield did not even remember whether he was at the meeting, although several witnesses testified to his presence and active participation. The preponderance of the evidence is that only one motion was put, that it embraced both propositions, and was carried unanimously.

It is significant that all the terms of the stockholders' agreement, as embraced in the motion testified to by defendants' witnesses, were subsequently carried out except that complainants failed to return their Atwell stock and some of their Newspaper Company's stock. The Literary Company carried out its proposition, and Atwell his. In accordance with the terms of the latter all the stockholders received the number of shares of Literary Company's stock as proposed by Atwell, he relinquishing what would otherwise have come to him in order to effect the arrangement, and 10 per cent on the Atwell stock to the date of the transfer to the Literary Company, which together with the Newspaper Company's indebtedness was paid by Atwell. In other words, all the stockholders including complainants admittedly consented to the transfer to the Literary Company and unquestionably received the benefits of the private arrangement between them and Atwell. Atwell at the time of the hearing some ten years later supposed complainants had returned their stock according to the agreement. In the meantime they made no claim for dividends in the Atwell Company's stock nor made any inquiries of him or the Company with regard thereto, and presented no convincing reason for not doing so if they still regarded themselves stockholders in the Atwell Company.

In connection with complainants' retention of the Atwell Company's stock it is significant that they also still retain some of their Newspaper Company's stock, the obligation to surrender which they do not question, they having received Literary Company's stock in its stead. All the other stockholders surrendered both their Atwell and Newspaper stock

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 volumes of the *Journal of the Royal Society of Medicine*,
 which was published in 1891, contained a paper by Dr. J. H. Green,
 on the subject of the "Influence of the Atmosphere on the
 Health of the Human Body." This paper was one of the most
 important contributions to the subject of the influence of the
 atmosphere on the health of the human body, and it was
 one of the first papers in which the subject was treated in a
 scientific manner.

The second of these is the fact that the second of the three
 volumes of the *Journal of the Royal Society of Medicine*,
 which was published in 1892, contained a paper by Dr. J. H. Green,
 on the subject of the "Influence of the Atmosphere on the
 Health of the Human Body." This paper was one of the most
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 atmosphere on the health of the human body, and it was
 one of the first papers in which the subject was treated in a
 scientific manner.

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 volumes of the *Journal of the Royal Society of Medicine*,
 which was published in 1893, contained a paper by Dr. J. H. Green,
 on the subject of the "Influence of the Atmosphere on the
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 scientific manner.

and received no other benefits from the transaction than those received by complainants. Whether the Atwell stock issued to the Newspaper Company's subscribers was intended as security or otherwise, we think the evidence clearly shows that there was a subsequent valid agreement on their part to return the same to Geo. M. Atwell which was carried out in every respect excepting as to the formality of the actual surrender of complainants' stock which under the circumstances they must be deemed to hold in trust for Atwell.

Complainants drew out by cross examination that after the vote was taken on the propositions Atwell dictated what is referred to as a "resume" or "statement" of the action taken that was signed by the parties present. This was done in response to a request by a representative of the Literary Company, present at the meeting, to show the consent of all the stockholders to the transfer of the assets of the Newspaper Company to the Literary Company. This was apparently its sole purpose. While complainants had no recollection of signing any statement they testified that they signed none with regard to transferring Atwell stock, and there is no definite testimony that such statement contained anything except the assent of the stockholders to the transfer to the Literary Company. No minutes as such of the stockholders' meeting seem to have been taken. A diligent search for any papers relating to the matter was made by Atwell, the president, Howard M. Howland, the secretary, and Atwell's stenographer who took the dictation of the resume or statement. Neither any minutes nor such statement was found upon such search. It does not, therefore, definitely appear that there was a written agreement between the stockholders with reference to the return of the Atwell stock or anything else except as to the acceptance of the Literary Company's proposition. The demand for such a statement

was made by the latter company's representative merely for evidence of the legality of such transfer. It was not concerned with any private arrangement between Atwell and the stockholders of the Newspaper Company, which would hardly find place in a statement for the Literary Company. It not appearing definitely that there was any written agreement between the stockholders except as to the transfer to the Literary Company and that no regular minutes of the stockholders' meeting were kept, and if kept, that after diligent search where they would likely be if in existence they could not be found, we think there was no error in denying complainants' motion to exclude the evidence heard as to what took place at such stockholders' meeting. It seems to have been the best evidence of the fact that a vote was taken and what it embraced.

Reaching the conclusion, therefore, that complainants were not bona fide holders of said stock and have no equitable standing as complainants to a bill of this character we think the decree dismissing it should be affirmed.

AFFIRMED.

187 - 24534

JOHN KORINEK,
Appellee,

vs.

JOSEPH KOLAR,
Appellant.

Appeal from
Superior Court,
Cook County.

215 I.A. 633

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a suit for slander. Verdict and judgment were for appellee, the plaintiff. At the close of plaintiff's case defendant moved to exclude the evidence and for an instructed verdict in his favor. The motion was denied. Defendant stood upon his motion offering no defense and urges that it should have been granted because the evidence showed a fatal variance in that the slanderous words were spoken in the Bohemian language and are declared upon in the English language.

Appellee concedes that the declaration should have set out the foreign words with a translation thereof, but insists that as there was no objection to the evidence the question of a variance was not properly raised. Under the declaration the words were presumptively spoken in English and there was no ground for objection to their being ^{so} spoken until it subsequently appeared that they were uttered in Bohemian. As said in Alford v. Dannenberg, 177 Ill. 331:

There are many cases where it is impossible to make the objection in advance, as where a witness is detailing some transaction; but the ground upon which a verdict is asked necessarily becomes apparent at some time during the trial, and if it is not the same as that alleged, it is the duty of the court to act upon objection or proper motion to exclude the evidence."

As the motion should have been granted the judgment must be reversed. While there was no other ground for exclusion of the evidence, yet as the record does not show that the variance was specifically mentioned as the ground for the motion so that plaintiff could have availed himself of the right to amend, we

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This is a very old document, and it is very interesting to see the handwriting of the original owner. The handwriting is in a cursive script, and it is very difficult to read. The document is written on a piece of paper that is yellowed with age. The ink is dark, and it is very faded in some places. The document is written in English, and it appears to be a letter or a note. The handwriting is very elegant, and it is very well written. The document is written on a piece of paper that is yellowed with age. The ink is dark, and it is very faded in some places. The document is written in English, and it appears to be a letter or a note. The handwriting is very elegant, and it is very well written.

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shall also remand the cause.

REVERSED AND REMANDED.

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196 - 24544

IN RE ESTATE OF MARY E. CHAPIN,
deceased.

MABEL KAMM,

Appellant,

vs.

BERNARD VILLANGA, executor of
the estate of Mary E. Chapin,
deceased,

Appellee.

Appeal from

Circuit Court,

Cook County.

215 I.A. 633

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal presents the question whether a provision of the will of Mary E. Chapin, deceased, creates a perpetual trust for the maintenance of a cemetery lot. It reads:

I give and bequeath unto my brother, Fred Chapin, the sum of Five Hundred Dollars; provided, however, that if said Fred Chapin shall not survive me, then and in that event, it is my will that said sum of money shall go to my niece, Mabel C. Dudley. The said Five Hundred Dollars is to be used to maintain the cemetery lot."

There is nothing in the language employed inconsistent with the expenditure of said sum all at once or at any time in the discretion of the trustee, or that requires the bequest to be construed as one for the perpetual care of said lot in violation of the rule against perpetuities. So regarding the clause, the lower court properly overruled appellant's objection to the executor's final report of payment of said sum to Fred Chapin, trustee under said clause.

AFFIRMED.

THE
OFFICE OF THE
SECRETARY OF THE
NAVY
WASHINGTON, D. C.
JANUARY 1, 1878

DEAR SIR,
I have the honor to acknowledge the receipt of your letter of the 29th inst.

and in reply to inform you that the same has been forwarded to the proper authorities for their consideration.

I am, Sir, very respectfully,
Yours very truly,
J. D. LONG

208 - 24557

MISSOURI PACIFIC RAILWAY
COMPANY, a corporation,
Appellant,

vs.

PIESER LIVINGSTON COMPANY,
a corporation,
Appellee.

)
Appeal from
Municipal Court
of Chicago.

215 I.A. 633

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellant brought suit against appellee to recover an undercharge for an interstate shipment from Chicago to Kansas City, Mo., over the line of the Chicago & Northwestern Railway Co., the initial carrier, and that of appellant.

Plaintiff's statement of claim was supported by an affidavit and set forth the entry into and performance of a written contract for the shipment subject to certain conditions in the bill of lading, accepted by defendant, and to the classifications and tariffs then in force and effect approved by the Interstate Commerce Commission, according to which there was an undercharge of \$43.36 for the shipment.

Defendant denied none of these averments and filed no affidavit of merits, but filed a so-called "plea" which set up the double defense of the statute of limitations and want of jurisdiction. No evidence was heard or required, hence in view of plaintiff's affidavit and defendant's want of one, the court improperly denied plaintiff's motion for judgment in his behalf (Ill. Stats. Ann. par. 8593) in the absence of any showing of a different procedure in the Municipal Court. The court properly denied defendant's motion for judgment on the

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basis of a want of jurisdiction, but improperly allowed defendant's motion for judgment in its behalf based on the theory that the bill of lading did not constitute a written contract, and hence the statute of limitations had run against the action. Authorities are hardly necessary to show that bills of lading are contracts binding as such on the parties to them as well as a receipt (Hutchinson on Carriers, 3rd Ed. Vol. 1, p. 163, Secs. 157 and 178; Ill. Match Co. v. C. R. I. & P. Ry. Co., 250 Ill. 396, 402; Ill. Cent. Ry. Co. v. Schwartz, 13 Ill. App. 490, 496; King v. Barbarin, 249 Fed. 303), unless there was fraud or mistake in the execution which are not pleaded. The contract here was not only in writing, but as pleaded and sworn to was complete in every respect, assented to by defendant and fully performed on plaintiff's part. Hence, the action having been brought thereon within the statutory period of ten years, was not barred. Accordingly the judgment will be reversed, and as a jury was waived we will enter judgment here for the amount sworn to, viz. \$43.36.

REVERSED AND JUDGMENT HERE FOR \$43.36.

208 - 24557

FINDINGS OF FACT.

We find that there was a contract in writing for the shipment referred to made in December 1911, the terms of which were assented to by appellee and performed by appellant, and that the agreement was subject to the classifications and tariffs approved by the Interstate Commerce Commission, according to which there is due and unpaid from appellee to appellant the sum of \$43.36 on account of said shipment.

240 - 24591

CITIZENS BANK, a corporation
of Michigan City, Indiana,
Appellant,

vs.

OTTO SCHARMER, doing business
as Scharmer Const. Co.,
Appellee.

)
Appeal from
Municipal Court
of Chicago.
)

215 I.A. 633

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a suit predicated on the right of an assignee of a non-negotiable chose of action to sue in its own name (1) under Sec. 18 of the Practice Act, and (2) on a promise of the debtor after notice of the assignment to pay the debt to the assignee. At the close of plaintiff's evidence the court instructed a verdict for defendant. To justify the court's action appellee contends that plaintiff's pleading was defective and there was no evidence to support its allegations.

The pleading consisted of a statement of claim supported by an affidavit, on which defendant took issue. So far as said statement rests on said Sec. 18 of the Practice Act it substantially meets its requirements, and had defendant specifically pointed out the alleged defects therein, or in the affidavit, plaintiff might have been allowed to amend the same. Not having done so appellee cannot raise the issue of mere defects here for the first time. (McKenzie et al. v. Penfield, 87 Ill. 38.)

But on the promise of a debtor to pay the assignee, the latter can sue in his own name, a right not dependent on the statute but recognized before the statute was passed. (City of Carlisle v. Carlisle W. L. & P. Co., 140 id. 445, 452.)

If, as we think, there was evidence tending to support an assignment and such a promise the case should have been submitted to the jury. The evidence consisted of a letter from defendant replying to plaintiff's notice of the assignment and request for payment of the account, saying "We will say that this bill of \$290.10 to A. R. Colborn Company will be paid on the tenth of the month following." The Colborn Company was the assignor and we find nothing in the letter or the record inconsistent with this implied promise to pay the assignee. The letter was unquestionably intended to indicate defendant's recognition of the assignment and when the assignee might expect payment of the account. It admitted the existence of such an account and defendant's attorney admitted in open court that there was something due thereon to somebody, and the evidence tended to show that the account was due and that the debtor assented to the assignment.

None of appellee's contentions justified an instructed verdict for defendant. As to the claim of a variance in the date of the assignment, it was not material nor pointed out in the court below. (Zellers v. White, 208 id. 518.) Plaintiff did not abandon its pleading because it did not avail itself of leave to amend on the face as to such date, but, on the contrary, in effect stood by it. (W. C. R. R. Co. v. Wieczorek, 151 id. 579.) Nor did plaintiff release its right under the assignment except on condition the debt was paid to the receiver in bankruptcy of the assignor, who did not collect it but on the contrary notified the defendant to pay the same to plaintiff. While there was no proof of the validity of the assignment under the law of Indiana, where made, it was good at common law, which, in the absence of proof, is the same in Indiana as here. As there was evidence tending to support the statement of claim the verdict should not have been directed. Hence the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

JOHANNA DECKER, doing business
as E. Decker & Company,
Appellant,

vs.

C. C. DYBALL and GEORGE O. COTTON,
doing business as Dyball & Cotton,
Appellees.

Appeal from
Municipal Court
of Chicago.

215 I.A. 634

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellant brought suit to recover damages on the theory of misrepresentation and breach of implied warranty by appellees in a sale to them of three cars of potatoes. This appeal is from a judgment entered on the court's finding for defendants.

Defendants did business at Volga, South Dakota, and were loading cars of potatoes purchased from farmers in that locality with the intention of shipping and selling them to the best bidder. Plaintiff dealt in potatoes in Chicago and her agent Marks was buying for her in South Dakota. Telephoning from about 40 miles from Volga he had a conversation with defendant Dyball about what potatoes defendants had, price, etc. Dyball gave description and price. In a later conversation that day over the telephone a deal for the three cars at the price submitted was closed "f. o. b. Volga, consignment to plaintiff at Chicago." The sale was Oct. 13, 1917, and the potatoes arrived in Chicago about ten days later in a condition, as testified to by plaintiffs' witnesses, whereby on reassortment about one-fourth of them was found to be frozen and spoiled, and the rest not in a merchantable condition, and plaintiff sold them at a considerable loss.

The parties differed as to the telephone conversation,

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Marks claiming that Dyball represented the potatoes he was loading as good sound stock, screened and "fine stuff," and Dyball claiming that he told Marks that the potatoes were not screened but field-run potatoes in good condition except that there were a few frost-bitten, not to exceed a peck in a load, and that he invited Marks to inspect them, which he did not do, but that they conformed to the description he gave. Defendant Cotton testified to a telephone conversation with Marks had later in the day in substance the same as that testified to by Dyball, and their testimony as to the condition of the potatoes when loaded was corroborated by other witnesses. On the other hand, plaintiff introduced evidence tending to show that on inspection of the potatoes after their arrival about one-fourth of them were frost-bitten and rotting, and that the rest were unmerchantable because of inferior size, dirt, etc., and that the weight did not correspond with that given by defendants.

We shall not undertake an analysis of the evidence to determine the most credible theory as to the terms of the contract or condition of the potatoes either before or after shipment, or discuss what may have been the effect upon them of freezing weather while in the course of transportation. The conflicting evidence is of such a character that we cannot say that the court's findings were manifestly against the weight of the evidence, or that the court was not warranted in finding that plaintiff failed to establish by a preponderance of evidence her claim of a sale for other than unscreened or field-run potatoes deliverable for shipment at the place of sale under circumstances making the rule of caveat emptor applicable. With this conclusion it is unnecessary to discuss the doctrine of implied warranties.

AFFIRMED.

The first thing I noticed when I stepped out of the car was the cold. It was a sharp contrast to the warm blanket of the car. I shivered as I walked towards the entrance of the building. The air was thick with the scent of old books and the sound of footsteps on the polished floor. I felt a sense of anticipation as I approached the door. The door was slightly ajar, and I pushed it open. The interior was dimly lit, with the light coming from a few small lamps. The walls were covered in bookshelves, and the floor was made of dark wood. I walked deeper into the room, and the atmosphere became more mysterious. The silence was broken by the sound of a clock ticking on the wall. I felt a sense of being in a place that had been there for a long time. The air was still, and the light was soft. I felt a sense of peace as I walked through the room. The door was closed behind me, and I was alone. I felt a sense of freedom as I walked through the room. The door was closed behind me, and I was alone. I felt a sense of freedom as I walked through the room.

265 - 24616

CHARLES C. MARTENS,
Appellee,

vs.

Appeal from
Municipal Court
of Chicago.

THE L. & M. RUBBER COMPANY,
a corporation,
Appellant.

215 I.A. 634

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This suit is based upon the right to rescind a contract and recover the consideration paid with interest on account of appellant's failure to perform. The verdict and judgment were for \$570.83, the amount claimed.

On payment of \$500 by appellee he received five shares of the appellant company's stock together with what is designated as an "original stockholder's bonus" and an "identification card." The "bonus" is a certificate of the company that Martens as an original stock holder is entitled to buy for his personal use the company's tires at cost of manufacture as long as he continues to own the stock. On its face it is stated to be "in the nature of a bonus," not salable, transferable or negotiable, and to be void if purchases are made or attempted for other than personal use. The identification card contains these same provisions and is intended to identify the stockholder entitled to and assured of such privilege.

Appellant company was in the business of manufacturing automobile tires, and appellee in a business requiring frequent supply of them. It is apparent both from the nature of the contract as evidenced by the documents above described, which were simultaneously delivered with the cash payment of \$500,

as well as the attendant circumstances and representations, that one, if not the main, inducement to appellee's becoming a stockholder was to obtain tires at manufacturer's cost, and it is also apparent that the contract was entire and not divisible, the sale being for a gross price, and the consideration being neither expressly nor impliedly apportioned to matters embraced in the contract, namely, the stock and the personal privilege given to an original holder thereof. (35 Cyc. 113, 116.) The transaction might have been a profitable one to appellee had he obtained the tires he needed even if the stock paid no dividend, and, in fact, none was ever paid. But the evidence tended to show that appellee was unable to get tires needed for his personal use after having applied therefor at appellant's local offices at various times in the course of the three years intervening entry into the contract and bringing this suit. Accordingly he tendered back the stock, bonus certificate and identification card and demanded the \$500 paid therefor with interest. Appellee refused to accept the tender and to return the money. Hence this suit.

The defense set up in the affidavit of merits was in substance a denial of the promise to furnish tires on demand, and that prior to plaintiff's attempt at rescission of the contract the company kept tires on hand to supply all reasonable demands and that during that time plaintiff did not call for or request them. On these issues of fact we find no sufficient reason for disagreeing with the verdict in plaintiff's favor and hence need not enter into an analysis of the evidence bearing thereon.

Appellant urges that the contract was fully executed and that plaintiff could not rescind in the absence of fraud in inducing the purchase. As above stated, the transaction was

not a mere sale of stock but a contract to furnish tires to plaintiff at cost. As to such promise the contract was executory, and therefore subject to the right of rescission for failure to carry it out.

The contention that appellee lost the right to rescind through delay was not made below, and for that reason need not be considered here. But in view of the fact that plaintiff persisted in his attempt to get tires from defendant for a long period evidently hoping from the explanations given that his request would ultimately be complied with, and the fact that he received nothing from defendant except the papers referred to, we find little room for the contention or application of appellant's authorities.

We think, too, the rescission was complete and not conditional as contended. While plaintiff may still possess the stock tendered as aforesaid he must be deemed to hold it as bailee for the defendant company, and should he refuse to return it on demand appellant is not without its remedy.

While evidence was received on a theory of damages that was later abandoned, it plainly did not affect the verdict which was manifestly based on the right to the return of merely the purchase money with interest.

AFFIRMED.

It would be a great pleasure to have you
and your family with us for the winter
and to have you all with us for the winter
and to have you all with us for the winter

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276 - 24627

VICTOR KORICENSKI,
Appellee,

vs.

THE PULLMAN COMPANY,
Appellant.

Appeal from
Circuit Court,
Cook County.

215 I.A. 634

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in favor of plaintiff in an action for injuries sustained by him while an employe of appellant, The Pullman Company. The vital fact in controversy was whether or not the plaintiff was acting in the line of his employment or under authority from defendant at the time of the accident resulting in his injury.

He was injured by falling from a scaffold at a car in course of construction in one of defendant's shops. In this shop were three tracks on which steel cars were built, numbered 1, 2 and 3 respectively. Only 1 and 2 were in use on the day of the accident. In building a car the trucks were first brought on one end of the track where certain work was done, then moved to a second position, where further work was done, then to a third position where other parts were attached, and so on to completion, being thus moved to successive positions until the car reached the last one, called the O. K. position, where it received inspection. These positions were about the length of the car. There were twelve of them on track 1 and thirteen on track 2. There was a general foreman over the entire shop, under him a track foreman for each track, and under the track foreman a so-called leader for each position, except in some cases there was a leader for two or more positions. The leader

for the last position was called the O. K. foreman. There was a gang of about twelve men at each position. A scaffold ran along the track on which the men stood in doing riveting and other work. Plaintiff was a fitter, setting material in place for the riveter. A buckler worked with the riveter holding the belts in place with an iron bar while the riveter operated the hammer. Men were paid by the piece, that is, for each car on which they thus worked in the course of construction. Riveters and bucklers received better pay than fitters.

On the day of the accident, there having been a suspension of work on track 2 where plaintiff was employed in a gang as a fitter, he went over to the ninth position on track 1 where his friend Frank Ankiewicz was working as riveter to get a key to his clothes locker. When he arrived there Ankiewicz's buckler, Stephen Fichko, had temporarily left his position to get a new bar, and plaintiff undertook to do bucking for Ankiewicz. Plaintiff claimed that he received the assent or authority of a foreman so to do after he had been asked by Ankiewicz to assist him. Ankiewicz had no authority to substitute another buckler, and if plaintiff acted merely on his invitation, he was a mere volunteer or in a position analogous to that of a trespasser or licensee in which defendant owed him no special duty. (4 Thompson on Neg. Sec. 4677; 2 Laball, Master and Servant, Sec. 633.)

The burden of proving that plaintiff was working in the line of his employment, as averred in his declaration, rested of course upon him, and we do not think the claim was sustained by a preponderance of evidence. The defendant showed by several witnesses, who from position and experience were familiar with the organization of the shop and the system and

methods of carrying on its business, and whose testimony on these matters is hardly subject to question, that on the day in question plaintiff was assigned to a certain position on track 2 and was working under the foreman of that track, and that under the system he could not be authoritatively transferred to a position on track 1 and would not receive pay for work done thereon except through an arrangement between the respective foremen of said tracks. No such arrangement was made or pretended to have been made. Plaintiff made no pretense of working there under authority until after he was invited by Ankiewicz to buck for him. He testified that he then received the assent of a foreman or leader called "Jim", obscurely referred to by him as the "O. K. foreman". It was clearly shown that there was no foreman or leader by that name working on either track, and no one except plaintiff testified to knowledge of any man there of that name. He did not otherwise identify him. Ankiewicz was the only witness to corroborate plaintiff's testimony as to his receiving such authority. He testified that he saw a foreman, whom he did not attempt to identify by name or description, walking around the scaffold just as plaintiff came, and that plaintiff said something to him and the alleged foreman motioned towards Ankiewicz. The foreman of that track, to whom Ankiewicz might have referred, was at the end of the car at the next position, but testified that he not only gave no assent to plaintiff's working in that position but even had no knowledge of his presence there until the accident occurred. Both plaintiff's and Ankiewicz's ^{testimony} is very contradictory on several material points. Both testified that Ankiewicz invited plaintiff to assist him, but Ankiewicz in a statement made after the accident in the presence of another witness and verified by him said "he (referring to plaintiff) came over to my car to get a

key and then he stayed around for a short while loafing; and then picked up a bucking bar and started bucking for me. He did so in order to learn how to buck. I did not ask him to do so. He asked me if he could. He had just started to buck the first rivet when he fell down." Consistent with this statement was the testimony of Fichko, his bucker, who said that when he returned to the position and found plaintiff bucking in his place he told plaintiff to give him the bar because he was in a hurry to finish the car, and that Ankiewicz said "leave him alone, let him learn something." Plaintiff was a fitter and as such received less wages than a bucker. He and Ankiewicz, as the evidence indicates, had lived together at the same place for nearly a year prior to the trial. The testimony of each was so inconsistent and contradictory in so many material matters as to impair its weight and credibility. Not only did they fail to identify the person alleged to have given authority or assent to plaintiff's working with Ankiewicz, but the only persons having authority to make the transfer testified that it was not given. Even the leader of that position had no such authority. His name was Henry Sieboldt. At the time of the trial he was not working for defendant and was in the State of Georgia. While defendant not in the nature of things anticipating plaintiff's testimony on the question of authority did not procure his deposition, still there was no attempt to identify Sieboldt as the person referred to as "Jim". In fact he could not confer such authority.

It would subserve no useful purpose to point out or discuss the various inconsistencies and contradictions which greatly impair the value of the testimony of plaintiff and Ankiewicz bearing on the question of plaintiff's receiving authority to work in the position where he was injured. It is

enough to say that the verdict in our opinion was manifestly against the weight of evidence to the effect that he was a mere volunteer in such position, working without due authority and not in the line of his employment, as alleged in the declaration.

The law on the subject is fundamental and will hardly be questioned that when an employe steps outside the line of his duty the relation of master and servant is deemed to be temporarily suspended. As stated in 4 Thompson on Negligence, Sec. 4677, "his position is then analogous to that of a trespasser or bare licensee; the master owes him no duty to anticipate his deviation from his duty and the possible danger which may arise therefrom and to provide against it; he takes things as he finds them and suffers the consequences of his own error; and cannot make his master liable therefor. The law will not, on obvious grounds of justice, compel a master to pay damages which the servant has brought on himself by undertaking to do something which the master did not employ him to do, but will ascribe his calamity to his own unnecessary and gratuitous act." This principle was recognized and fully discussed in Dietzen Co. v. Industrial Board, 279 Ill. 11. We deem it unnecessary to elaborate on it. As said in Stagg v. Western Tea & Spice Co., 169 Mo. 489, cited in the Dietzen case, "the general rule unquestionably is that the master is not liable for injuries to his servant unless the servant was at the time in the performance of some duty for which he was employed."

Inasmuch as the verdict was against the manifest weight of the evidence on the question whether plaintiff at the time of the injury was performing a duty for which he was employed there can be no recovery in this action, and the judgment must be reversed with a finding of fact that at the time of the injury plaintiff was not performing a duty for which he was employed by defendant.

REVERSED WITH A FINDING OF FACT.

276 - 24627

FINDING OF FACT.

We find that appellee, Victor Koricenski, at the time of receiving the injuries referred to in the declaration was not performing any duty or work required of him in the line of his employment by appellant, The Pullman Company, as alleged in his declaration, but the work he was so performing was rendered as a volunteer without the authority or assent of the defendant or any of its authorized representatives.

1880

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279 - 24630

ROBERT S. ILES and ROBERT
D. MARTIN,
Appellees,

vs.

JULIUS HEIDENREICH et al.,

On Appeal of IDA M. HEIDENREICH,
Appellant.

Appeal from

Superior Court,

Cook County.

215 I.A. 634

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The original bill in this case was a creditor's bill as amended based on a judgment in favor of appellees against Julius Heidenreich and the return of executions thereon "nulla bona and no part satisfied." Said Julius, his daughter Ida M. Heidenreich, and the sheriff of Cook county were parties defendant to said bill which alleged among other things that the sheriff held money paid in redemption of a certificate of sale of real estate on foreclosure which was issued to Julius and by him fraudulently assigned, as against his creditors, to his daughter Ida, and contained the usual allegations as to disposal and concealment of his property, etc. in fraud of Julius' creditors. The bill sought to set aside such assignment and satisfaction of said judgment out of the fund in the sheriff's hands, and a discovery of his assets.

The sheriff answered the bill and filed a cross bill in the nature of a bill of interpleader. Julius demurred to the cross bill and Ida answered it. To the amended bill they filed pleas which were overruled, and by which they elected to stand. The court entered a decree pro confesso on the bill, and a separate decree on the cross bill granting injunctive relief and finding the assignment of said certificate to be fraudulent.

On appeals to this court from these decrees they were reversed with remanding orders, we holding that while the pleas

to the bill were properly overruled the allegations of fraud as to the assignment were insufficient to support the findings of the decree thereon (201 Ill. App. 619, 625) and holding as to the decree on the cross-bill that the injunction should be modified and that issues should be formed on an order to interplead. (Abstracted in 201 id. p. 1,5) The mandates were for proceedings not inconsistent with said opinions.

On the reinstatement of the cause complainants were allowed over objections and exceptions by Ida to file an amended and supplemental bill containing in addition to the allegations in the original bill averments that said assignment to Ida was without valuable consideration and that at the time thereof Julius in anticipation of said judgment had concealed or transferred all of his other property beyond reach of legal process, and that Ida was his adviser and counsellor in such matters and had confederated with him in said fraud upon his creditors. Ida filed an answer to said amended and supplemental bill denying all manner of fraud, etc. and confederacy therein on her part, and alleging that said assignment was for a good and valuable consideration. No replication was filed and Julius was defaulted for want of an answer. On her motion the court ordered a reference to a master to take proof of the material issues raised by the bill, the cross bill and interpleaders and to report his conclusions of law and of fact.

The decree disposed of the issues raised on both the amended and supplemental bill and the interpleading to the cross bill which include whether such assignment was fraudulent and whether that question was not res judicata. It finds that replications were waived by the reference, that the proofs taken before the master applied fully to the issues raised on the cross-bill and interpleadings thereto as well as on the amended and supplemental bill, that they were taken without

objection, that on or about August 3, 1911, when appellees began their suit in which the judgment against Julius was obtained he was possessed and owned property in Cook County where the judgment was obtained, which he concealed and has ever since kept concealed, that about ten days later he conveyed to his daughter Ida a house and lot in Cook County constituting his homestead, that he obtained said certificate of sale on November 29, 1911, and assigned it to her January 23, 1913, and that both the deed of conveyance and said assignment were without consideration and for the purpose of defrauding his creditors, etc. and the decree adjudged that both said deed and assignment were null and void as against complainants, and that complainants have a valid lien on said redemption money which had been paid in the hands of the clerk of the court, and that on failure to pay the judgment the same together with costs of this suit be satisfied out of such moneys in the hands of the clerk, and if such fund is insufficient that complainants be authorized to proceed to levy upon said real estate, etc. Both Julius and Ida took exceptions to the decree, to the overruling of the exceptions to the master's report, and to taxing the costs of the master's fees. From such decree Ida appeals.

The main question before us is whether the case was open to a retrial as to alleged fraud in said assignment. On the reversal of the decree on said original bill we remanded with directions for such action as was consistent with our opinion. The decree so reversed set aside such assignment as fraudulent, finding that it was made with the intent to defeat and prevent recovery by complainants in their action at law. In reviewing that feature of the case we said in our opinion (201 Ill. App. 619) that such finding rested mainly on only two of three elements necessary to impeach the assignment, namely, that it was a voluntary gift and that there was an

existing indebtedness of the donor when it was made, but that there was no allegation in the bill to supply the third element that the donor did not retain sufficient property to pay his indebtedness. Citing State Bank of Clinton v. Barnett, 250 Ill. 312, a similar case in which a decree was reversed with directions to dismiss the bill, we said:

"But we are of the opinion that the bill should not be dismissed and that complainants would still have a right to proceed under a bill for the discovery of property alleged to be concealed. Accordingly the decree will be reversed and the cause remanded for such action as is consistent herewith."

Whether we should not have dismissed the bill because complainants failed to make discovery of the alleged concealed property of the judgment debtor when they had the opportunity to do so is not pertinent to this inquiry or subject to our review. But it is manifest that our opinion restricted further proceedings to the question of such discovery. As said in Parker v. Shannon, 121 Ill. 452, "where a certain mode of proceeding is marked out in the opinion and the direction to proceed consistently therewith, any other mode of proceeding is excluded." In Hook v. Richeson, 115 id. 431, construing a remanding order for further proceedings in conformity with the opinion, which stated that the case might be opened to the parties to take further proof as to a certain matter, the court held that the cause was not open for any other purpose, and that the introduction of new matters by amendment and proof was not permissible. To the same effect are Gage v. Bailey, 119 id. 539; In re estate of Maher, 210 id. 160; Noble v. Tipton, 222 id. 539; Gillespie v. Fulton Oil Co., 244 id. 9; Lynn v. Lynn, 160 id. 307.

This case was not remanded to make up new issues or to retry questions concluded by our opinion, but merely to allow complainants to uncover concealed assets that might be reached by order or process of court. It was not proper, therefore, to permit an amendment to the bill so as to present

anew whether the said assignment was fraudulent. In the Gillespie case, supra, the court said that when the case was before it the first time a homestead right was sought to be litigated and that it then held that the question was not properly raised in the pleadings, and that when it was reinstated the trial court attempted to dispose of the homestead estate without an amendment to the pleadings, and that the decree was again reversed with directions to modify it by omitting all reference to the homestead estate. The court said that upon the case being reinstated the trial court could not so change the issues by amendment of pleadings or otherwise, as to permit it to pass upon the question of the homestead rights in view of the direction given in remanding the case.

It was also said in the Gillespie case that the supplemental bill filed after remanding the case was wholly unnecessary for its proper disposition and that leave to file the same should not have been given, that it set up no new facts and, at most, was but a recital of a history of the case as it had travelled back and forth through the courts, etc. The same may be said as to the supplemental bill here. It set up no pertinent facts that did not exist at the time of filing the original bill except certain proceedings since had in the case, and the fact that the sheriff had paid the redemption money into court and been discharged from further liability. Whether it be treated as an amended or supplemental bill, or both, we think the trial court improperly allowed it to be filed, in view of the sole purpose for which the case was remanded.

Notwithstanding the remanding order of said cause for the purpose of permitting complainants to discover concealed property no reference is made to concealed property in the decree before us except by a general finding that Julius Heidenreich at the commencement of the suit in which the

judgment was obtained against him "was then and there possessed of and owned property in said county of Cook and State of Illinois, which he concealed, and has kept concealed, ever since that time"; and the specific finding "that on or about August 14, 1911, he conveyed his homestead, comprising lots 7 and 8, in block 53, * * Morgan Park, Illinois, by warranty deed to his daughter, the defendant Ida M. Heidenreich, and that said deed was and is without consideration," and that it was made, executed, etc. for the purpose of defrauding and hindering and delaying the creditors of Julius Heidenreich, including complainants. And, as above stated, the decree orders that such conveyance be set aside and that said homestead may be levied upon and sold to satisfy said judgment. No other reference is made in the decree to concealed assets, notwithstanding allegations in the bill and Julius Heidenreich's admission thereof by default that at the date of said judgment he was the beneficial owner of \$86,000 in money and securities or other property that he kept concealed, and also the owner or beneficially interested in some real estate in the county of Cook from which he received large revenue, etc. No special reference was made in the bill to conveyance of any real estate to his daughter Ida. No facts were alleged in the original bill whereby she became a party thereto except by her connection with said assignment, nor do we find any allegation therein whereby she would have been called on to answer with reference to her interest in said homestead estate. Nor is there anything in the amended and supplemental bill which connects her with a fraudulent transfer thereof/^{except} the general allegation that she was his agent and advisor and was well informed of any disposition he had made of his property. In her answer to the amended and supplemental bill she admitted that Julius Heidenreich had received \$86,000 as alleged in the bill, but denied personal

knowledge of what he had done with the money or securities or that she was his agent or advisor with respect to his property. There was no uncovering of these alleged concealed assets at the hearing before the master, but it appeared that Ida bought the so-called "homestead", as it is referred to in the decree and testimony, from her father, and it is shown that he lived there when in Cook county. No evidence was given of its value. If it was \$1,000 or less it was manifestly exempt from execution, and therefore not subject to the lien thereon given by this decree. We cannot assume without evidence or proper findings that it was worth more.

Nor do we think the homestead could be regarded as concealed property within the purview of inquiry under the remanding order, for it appeared from the evidence that one of the complainants knew of the residence of Julius Heidenreich and his daughter Ida on said homestead as early as 1910, and the testimony developed the fact that he, when in Cook county, and his daughter Ida continued to live at said place up to the time of the hearing. Whether it was fraudulently conveyed was one question, whether it was concealed property was another. Under the circumstances we do not think it can be regarded in the light of the latter and thus a matter for inquiry under the remanding order. But if it was, its value was not shown.

As for these reasons the decree cannot be sustained, and as it granted relief only as to the conveyed homestead and said redemption money, it must, for the reasons stated, be reversed with directions to dismiss the bill. This conclusion will dispense with the necessity of considering any other questions with regard to procedure complained of.

The gist of our opinions rendered on review of the decrees entered on the cross-bill was to the effect that the cross-complainant (the sheriff) should be dismissed out of the case and

the different claimants of the fund be required to interplead. On the cause being reinstated Julius disclaimed interest in the fund, and Ida set up that the question had been adjudicated. Her plea to that effect was overruled and as we think, improperly. But as all the issues, including the title to said fund, were practically merged and involved in the hearing before the master and are left in shape to be finally disposed of under the views we have already expressed, the decree will be reversed and the cause remanded with directions to dismiss the bill for want of equity, and to enter an order directing the clerk of the court to pay over to Ida Heidenreich the \$3,000 now in his custody.

REVERSED WITH DIRECTIONS.

300 - 24651

GAROUFO MARKOS,
Appellee,

vs.

JOHN E. TRAEGER and
ALBERTINA GUDERIAN,
Appellants.

Appeal from
Municipal Court
of Chicago.

215 I.A. 635

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a replevin suit. The writ issued Feb. 6, 1918, was served on defendant Traeger the same day, and made returnable Feb. 11th. The other defendant was not served with summons, but the record shows that she entered her appearance March 4, 1918, and that a demand in writing for a jury trial was then filed for both defendants. On March 11, both parties filed an affidavit of defense. The following day the court struck such demand on plaintiff's motion and two days later proceeded to a trial without a jury, making a finding against defendants and entering judgment thereon.

We find nothing in the record to justify the court's action in denying the demand for a jury trial, which was duly made, as shown by the record, at the time the parties entered their appearance, as provided by section 30 of the Municipal Court Act before which time the court did not even have jurisdiction of defendant Guderian. It matters not so far as she is concerned what previous action, if any, may have been taken as to defendant Traeger, although the record shows none. In any event the error as to her in denying such demand requires a reversal of the judgment and remanding of the cause.

REVERSED AND REMANDED.

309 - 24660

AVERY A. MATHESON, Appellee,

vs.

BALDWIN COUNTY COLONIZATION
COMPANY, corporation,
Appellant.

Appeal from
Municipal Court
of Chicago.

215 I.A. 635

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a suit on certain promissory notes brought by the last endorser against the payee as the first endorser, which endorsed them to one of its stockholders. The defense pleaded was that said stockholder with plaintiff's knowledge took said notes as a dividend pursuant to an oral agreement between the company's stockholders whereby the company was thus to transfer the title but without liability as an endorser. In effect such defense was that of an oral agreement to endorse without recourse, and the pleading should have been stricken. Evidence offered of such an agreement was properly rejected on the familiar principle that parole evidence is inadmissible to contradict a written contract, which is applicable to negotiable instruments and the contract of a general endorser such as this was.

(Johnson v. Glover, 121 Ill. 283; Hately v. Pike, 162 id. 241; Martin v. Cole, 104 U. S. 30, and cases cited.) We find nothing to the contrary in the Negotiable Instrument Act.

Affirmed.

332 - 24683

PETER RIZZO, Appellee,

vs.

CITY OF CHICAGO et al.
On Appeal of CITY OF
CHICAGO,
Appellant.

Appeal from

Circuit Court of

Cook County.

215 I.A. 635

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for \$5,000 against the City of Chicago for damages resulting from plaintiff's driving into a hole in one of its streets, thereby causing him to be thrown from his wagon and injured in one of his knee caps. Two points only are argued, that an instruction on damages was misleading in telling the jury "they should take into consideration all the facts and circumstances as proven by the evidence before them touching the nature and extent of plaintiff's physical injuries," and that the damages were excessive. We do not think the instruction was misleading. While this point was not made in the following cases an instruction containing similar language was approved in C. R. I. & P. Ry. Co. v. Otto, 52 Ill. 417; West Chicago St. Ry. Co. v. Johnson, 180 Id. 285; I. C. R. R. Co. v. Mole, 165 Id. 334. Chicago & Milwaukee Elec. Ry. Co. v. Ullrich, 213 Id. 170. In the case of City of Chicago v. Gilfoil, 99 Ill. App. 88, cited to the contrary, it will be noted that the instruction did not as here limit the consideration to proven facts and circumstances touching the nature and extent of the injury.

The damages seem excessive. Plaintiff was at the hospital about a month and underwent some minor operation

described only by himself. None of the attending physicians testified. He was kept from active participation in conducting his grocery store some two or three months, when his wife attended to it for him, and suffered some pain. He still limps from the injury and cannot carry as heavy loads of "several hundred pounds," as before he was hurt, and for that reason now and then pays a small compensation for assistance in unloading goods. We think \$3500 would have been a sufficiently large verdict for the damages as described. If appellee remits to that amount within ten days herefrom the judgment will be affirmed, otherwise reversed and the cause remanded.

AFFIRMED ON REMITTITUR TO \$3500.

355 - 24707

GEORGE J. KUHN and IRVING
H. MAHLER, copartners
doing business as Globe
Cotton Goods Co., Appellees,

vs.

P. F. DELA HUNT,
Appellant.

)
Appeal from
Municipal Court
of Chicago.

215 I.A. 635

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

All the errors assigned in this case rest upon the bill of exceptions that was stricken from the record on motion of appellee February 26, 1919. None of them resting solely upon the common law record it follows that there is no question for our consideration, and hence the judgment must be affirmed.

AFFIRMED.

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393 - 24746

LINNIE LINDSAY,
Appellee,

vs.

RAILWAY MEN'S INTERNATIONAL
BENEVOLENT INDUSTRIAL
ASSOCIATION,
Appellant.

Appeal from

Municipal Court
of Chicago.

215 I.A. 635

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellee brought this suit alleging that she was the widow of a deceased member of defendant, a fraternal benefit society, that he was in good standing as a member at the time of his death, and that the society was obligated by its by-laws to pay her the sum of \$250 funeral benefits. Defendant's affidavit of merits alleged that there was nothing due her, that under the by-laws all members were required to pay 55 cents as consideration of the contract to pay burial benefits, and that deceased had paid defendant no sum except \$3, allowed as a commission, and that he was in arrears at the time of his death and not a member in good standing. The case was heard without a jury and the court gave judgment for \$200, the proper amount under its by-laws if deceased was a member in good standing at the time of his death.

The evidence showed that the association was organized the latter part of 1916 and that the dues were to accrue from January 1917; that deceased was an officer thereof and as such required to pay only 35 cents a month before June 1917; that he was allowed a commission ^{of} \$3 for obtaining new members, which its secretary credited to him in payment of his dues to August 1917, applying the same as follows: 35 cents for each month before June, 55 cents for each of the months June and July, and 15 cents for August. The deceased died in September following and having made no other payment was thus in arrears at the time of his death for only two months at most.

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One of the by-laws of the association provides:

"Members three months in arrears shall be non-financial, and six months in arrears shall forfeit all rights in the organization. Such members may be reinstated." According to the credits thus given to him he was not even three months in arrears, and therefore neither "non-financial" nor in arrears so as to forfeit his rights in the organization. He was not suspended by any affirmative action, and the mere failure to pay such dues would not ipso facto work a suspension. (Northwestern Travelling Men's Ass'n. v. Schauss, 143 Ill. 304.)

The defense is based upon the claim that because the credits so given to deceased were not entered in his due book by the secretary until the month of August he stood in arrears for more than six months prior thereto and therefore his beneficiary was not entitled to such benefit. If he was so in arrears, as no action was taken thereon and he subsequently received credit for the months he was in arrears, defendant must be deemed to have waived the cause of forfeiture. That there may be a waiver of the cause of forfeiture by permitting members of such an organization to pay assessments after they become due is a principle too well established to call for discussion. (Conductors' Benefit Association v. Tucker, 157 Ill. 194.) The defense that deceased was not in good standing was not, therefore, sustained.

It is argued that said funeral benefits were not payable to the widow in any event. No such issue was raised below either by the pleadings, proof or any ruling of court; hence it cannot be raised here for the first time. Accordingly the judgment will be affirmed.

AFFIRMED.

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93 - 24396

ILLINOIS SURETY COMPANY,
a corporation, Defendant in Error,

vs.

FRED B. RHODES,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

215 I.A. 636

STATEMENT OF THE CASE.

This writ of error was sued out to reverse a judgment rendered against the defendant in favor of the Illinois Surety Company, plaintiff, in the Municipal Court of Chicago, in a suit of the first class, for the sum of \$65,588.36. The judgment was rendered after the defendant had been adjudged in default for failure to file an amended affidavit of defense to plaintiff's amended statement of claim within the time limited by the court, and after a hearing before the court without a jury on the assessment of plaintiff's damages.

The defendant had been the representative at Washington, D. C., of the plaintiff under contract dated May 13, 1909, which contract was terminable at the will of either party and contained provisions as to the soliciting and execution of bonds and the payment of commissions to defendant. On November 28, 1911, the parties entered into a new contract, to continue in force for ten years, in which it was provided that defendant should act as plaintiff's agent in the District of Columbia, North Carolina and Virginia, solicit business, appoint sub-agents, and receive certain commissions, and in which it was further provided that defendant should receive a certain commission on all business within the states of South Carolina, Georgia, Alabama, Mississippi and Tennessee by such sub-agents as were defendant's sub-agents

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at the time of the execution of the contract. Before the commencement of the suit said contract was terminated by the plaintiff because of certain alleged violations of the terms thereof by the defendant.

The suit was commenced on February 21, 1914. In the original statement of claim it is stated that plaintiff's claim "is for balance due for premiums on surety bonds and undertakings executed on its behalf by the said defendant while acting as agent for the plaintiff at Washington, D. C." It is further stated that the "total amount of premiums due from the defendant to the plaintiff is \$14,276.29, less a commission of 35 per cent, which amounts to \$4,966.70, leaving a net balance due plaintiff of \$9,279.59, which the defendant refuses to pay." The defendant in due time entered his appearance, demanded a trial by jury, and on March 14, 1914, filed an affidavit of merits, and also filed a statement of claim of set-off for \$40,000 for unliquidated damages based on certain alleged breaches by plaintiff of said contract of November 28, 1911, and subsequent modifications. The court overruled plaintiff's motion to strike the set-off from the files and plaintiff filed an affidavit of merits thereto on March 28, 1914.

After a lapse of more than three years plaintiff, on July 31, 1917, by leave of court, filed an amended statement of claim. This document is a lengthy one. Including the exhibits A, B, ~~XXX~~ C and D, attached thereto, it occupies 124 pages of the transcript of the record, and shows plaintiff's total claim against defendant to amount to \$83,828.28. It is divided into 11 paragraphs, each setting forth separate items of damages. In paragraph 1 it is averred that defendant, while said contract of May 13, 1909, was in force, signed and executed, in the name of plaintiff as surety thereon, an administrator's bond conditioned for the faithful performance by one Walter H. Acker of his duties as administrator of a certain estate, and that because of certain subsequent proceedings in said

estate plaintiff was compelled to pay a certain judgment rendered against it on said bond, and that by reason of defendant's failure to comply with the terms and provisions of said contract "in not securing joint control of the assets of said estate, such joint control not having been waived by the home office of the plaintiff, said plaintiff has been damaged in the sum of \$3,794.95." In paragraphs 2 and 3 damages of \$13,457.96 and \$27,547, respectively, are claimed because defendant signed in the name of plaintiff, without the authority of plaintiff and in violation of the provisions of said contract, two contract bonds for Fancher & Driscoll for the construction of post office buildings at Paris, Kentucky, and Lexington, Kentucky. In paragraph 4, damages of \$5,398.65 are claimed for the same reasons in connection with the contract bond of David J. Phipps for the construction of a post office building at Fairbury, Nebraska. In paragraph 5, damages of \$6,187.66 are claimed for the same reasons in connection with the contract bond of Harman Brothers for the construction of a post office building at Point Pleasant, West Virginia. In paragraph 6 damages of \$241.21 are claimed because defendant failed to remit certain premiums on bonds written under said contract. In paragraph 7, damages of \$13,532.62 are claimed because defendant signed in the name of plaintiff, without the authority of plaintiff and in violation of the provisions of the contract of November 28, 1911, a contract bond for Harman Brothers for the construction of a post office building at Portsmouth, Ohio. In paragraph 8, damages of \$2,653.81 are claimed for the same reasons in connection with the contract bond of David McCarrahan. In paragraph 9, damages of \$7,641.21 are claimed for failure of defendant to remit certain premiums on bonds under said contract of November 28, 1911, as set forth in exhibits A, B and C, attached to said amended statement of claim. In paragraph 10, damages of \$2,948.30 are claimed for certain

unauthorized and unwarranted deductions under said contract made by defendant in his remittances to plaintiff, as set forth in exhibit D attached to said amended statement of claim. In paragraph 11, damages of \$195 are claimed for failure of defendant to remit the premiums on a certain guaranty bond for Cook & Stoddard Company.

The affidavit to said amended statement of claim is made by George O. Foy, who "on oath deposes and says that he is the duly authorized agent of the plaintiff, and as such makes this affidavit in its behalf; that the nature of plaintiff's claim is as above set forth in plaintiff's amended statement of claim, which is hereby expressly made a part hereof by reference thereto; that there is due to the plaintiff from the defendant, after allowing to the defendant all his just credits, deductions and set offs, the sum of \$83,828.28."

After several extensions of time within which to file an affidavit of merits to said amended statement of claim had been granted defendant, he was finally ruled to file same by November 27, 1917. He did not comply with the rule. On December 11th his attorneys were allowed to withdraw their appearance. On December 12th plaintiff moved for a default of the defendant and for judgment for defendant's failure to file an affidavit of merits, which motion was set for hearing on December 21st. On December 20th other attorneys filed their appearance as attorneys for the defendant, and on the same date, but without obtaining leave of court, filed in the clerk's office an affidavit of merits to plaintiff's said amended statement of claim, in which defendant set forth his defense thereto, paragraph by paragraph. On the following day, December 21st, a hearing was had on plaintiff's motion for a default and judgment, at which defendant's attorneys were present, and the court finally entered a draft order striking the said affidavit of merits from the files, denying defendant's motion to

file an affidavit of merits instanter, and defaulting defendant "for want of an amended affidavit of defense" and setting plaintiff's motion for judgment upon said default for a hearing on December 29th. On December 31st defendant moved the court to set aside the order of default of December 21st and for leave to file an affidavit of merits instanter, which motions were denied. On January 7, 1918, the court entered another draft order from which it appears that plaintiff moved the court for leave to withdraw its affidavit of merits to defendant's statement of claim of set off filed March 14, 1914, and to strike defendant's said claim of set off from the files, and that said motions were allowed and said claim of set off was stricken; that plaintiff moved for judgment upon plaintiff's affidavit of claim attached to its amended statement of claim; that defendant moved for an assessment of damages by a jury, which motion was denied; and that plaintiff's motion for judgment was set for January 26, 1918, for consideration by the court as to what further evidence, if any, the court would require plaintiff to produce of the amount of its said claim other than plaintiff's said affidavit of claim.

At the beginning of the hearing for the assessment of damages the court ordered that plaintiff introduce evidence of the amount of its said damages "supplementary to its said affidavit of claim," and ruled that defendant would not be permitted to introduce any evidence and should be limited on cross examination to the abating of damages only. Upon the court expressing doubt as to plaintiff right to recover on any claims against it which had not been paid, but for which it was tentatively liable, plaintiff's counsel announced he would waive these claims and the evidence introduced was limited accordingly. This accounts for the fact that the judgment entered is considerably less than the amount claimed in plaintiff's amended statement of claim. The court said: "I have not had any doubt about my right to enter a judgment by

default on the affidavit, but I have had serious doubts about assessing any damages for the plaintiff on a possible, tentative liability. With that out of the way, the court will not be very technical in insisting upon the proof, except such as in a general way will satisfy the court that the plaintiff has sustained the damages it claims." The hearing lasted several days. Five witnesses testified at length on behalf of plaintiff and they were cross examined by defendant's counsel. Two long statements of account were introduced by plaintiff as exhibits. At the conclusion of plaintiff's evidence defendant's counsel offered in evidence 20 letters and documents, which had been marked for identification during the taking of the testimony on behalf of plaintiff. An argument then ensued between the court and the respective counsel as to what evidence, if any, might be introduced by the defendant. The court finally refused to admit said letters and documents. And as to the right of the defendant to introduce any evidence, it appears that the court modified the ruling made early in the hearing as above stated. The court said: "If they actually collected a premium, I will let you show any evidence you have got. * * With that exception, what you have stated is not admissible evidence in the assessment of damages on default. If you can show actual payments of amounts they claim, I will let you show that." Thereupon counsel for defendant expressed surprise, in view of said prior ruling and in view of the rulings on questions put to plaintiff's witnesses during cross examination, that the court was willing to receive any evidence by the defendant, and stated that he had testimony to introduce, in conformity with the court's present rulings, but that the same was not immediately available, and asked for a few days within which to produce the same, but the court denied the request. Thereupon defendant's counsel called as a witness James S. Hopkins, receiver of plaintiff. Several questions asked him were not allowed to be answered, a

letter signed by the witness was not allowed in evidence, and, upon the witness' statement that certain facts would be disclosed from certain books of plaintiff which he could produce, the motion of defendant's counsel for the production of the said books was denied. Thereupon the court entered a finding in favor of plaintiff and assessed plaintiff's damages at the sum of \$65,588.36, and, after overruling defendant's motion in arrest of judgment, entered the judgment.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

After a careful consideration of the record before us we have reached the conclusion that substantial justice between the parties demands that the judgment be reversed and the cause be remanded for a new trial upon the merits.

In Cairo & St. Louis Railroad Co. v. Holbrook, 72 Ill. 419, 422, it is said:

"While the default admits every material allegation of the declaration, still, it does not admit the amount of the damages. The defendant, on the execution of the writ of inquiry before the court, could not introduce evidence tending to show that plaintiff had no cause of action, but would have the right to cross-examine plaintiff's witnesses and introduce witnesses on its part on the question of damages, ask for instructions as to the proper measure of damages, and preserve the rulings of the court by bill of exceptions."

See, also, Plaff v. Pacific Express Co., 251 Ill. 243, XX 247. We are of the opinion that the trial court, on the hearing for the assessment of damages, unduly limited defendant's counsel in his cross examination of plaintiff's witnesses. Several of the questions asked the several witnesses, to which objections were sustained, were such that the answers thereto, had they been given, would have probably presented facts tending to the mitigation of plaintiff's damages. Furthermore, we think that under the peculiar facts disclosed in the present record, the court, in the exercise of a sound discretion, should have, on December 21, 1917,

allowed defendant's motion to file instanter his affidavit of merits, which was then ready to file, to plaintiff's amended statement of claim, and not entered the default of defendant for failure to file same within the time previously limited. And we think that the court, in the exercise of a like discretion, under the circumstances disclosed, should have allowed defendant on January 29, 1918, (the day the finding and judgment were entered) further time within which to introduce further evidence in mitigation of damages.

REVERSED AND REMANDED.

ALBERT J. PARDRIDGE and
HAROLD BRADLEY,

Appellees,

vs.

WILTON B. MARTIN,

Appellant.

Appeal from
Municipal Court
of Chicago.

215 I.A. 636

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a suit of the 4th class in the Municipal Court plaintiffs, as real estate brokers, claimed that the sum of \$670 was due them for commissions from the defendant. After a hearing before the court without a jury a judgment for \$670 against defendant was entered and subsequently this appeal was perfected.

In the spring of 1916, the defendant was erecting an apartment building, known as No. 191 East Walton Place, Chicago, and consisting of six apartments of ten rooms each. At this time one of the plaintiffs, Harold Bradley, was engaged in the real estate brokerage business, under the name of Harold Bradley & Co. He, being desirous of assisting defendant in procuring tenants for the building when completed, had a conversation with defendant in May, 1916. At this time two of the apartments in the building had already been disposed of, leaving four to be rented. As a result of said conversation Bradley, on May 22, 1916, wrote a letter to defendant making a proposition, which the defendant in writing accepted. It was provided therein, in substance, that Bradley, agreed to use his best efforts in securing leases for defendant's apartments "from the present time until October 1, 1916"; that Bradley was to be the exclusive agent for that purpose; that as

Bradley forwarded each signed lease (which was accepted by defendant) defendant should pay Bradley the full Chicago Real Estate Board commissions then current, less a deduction of 2%; and that a "bonus of \$400" should be paid Bradley, plus the 2% deduction withheld on advance payments, "if a condition exists on October 1, 1916, of all four remaining apartments being rented," whether wholly or partly due to Bradley's efforts. Early in September, 1916, Bradley secured a tenant named Goodspeed for the 3rd apartment, the lease was signed, and defendant paid Bradley the commissions due him for securing said tenant. About this time Bradley interviewed defendant regarding a modification of said agreement of May 22, 1916, and as a result of the conversation Bradley, in the name of Harold Bradley & Co. on September 14, 1916, wrote defendant a letter in part as follows: "In accordance with our verbal understanding of a few days ago, the commission agreement between us has been modified so that we are to receive the regular Chicago Real Estate Board commission on the leases for which we are directly responsible, with a further understanding that in order for us to win the bonus that has been provided we must ourselves turn in the remaining three leases; in other respects the agreement remains the same." The defendant agreed to this modification.

On October 4, 1916, Bradley formed a partnership with Albert J. Pardridge, under the firm name of Pardridge & Bradley, and they succeeded to the business of Harold Bradley & Co. In the latter part of October, both Pardridge and Bradley called upon defendant for the purpose of securing the management of the apartment building. In their mission they were unsuccessful. As to this interview the defendant testified: "They said they had called with reference to trying to persuade me to give them the management of the building for one thing, and for another

thing that they wanted to make an arrangement about the rentals. I told them that I would be very pleased to have them rent the building if they could, but that I could not give them an exclusive agency any more; the contract had expired and other brokers had the property on their books to rent; also that, of course, the bonus proposition could not be continued." Mr. Bradley testified: "The conversations I had with Mr. Martin after October 1, 1916, were in reference to prospective tenants. In none of these conversations, * * * was anything said about the payment of commissions or bonuses or anything of that kind. Mr. Pardridge and I went down to see Mr. Martin sometime in October, and we talked about the contract for the management of the building after it was completely rented. * * * At that time nothing was said about the renewal of the contract. * * * The only arrangement or contract that either I or Mr. Pardridge had with Mr. Martin in regard to the payment of the commissions and bonuses was embodied in this contract, - the letter dated May 22nd, as modified by the letter of September 14, 1916."

In April, 1917, through the efforts of Bradley, the 5th apartment was leased to a tenant named Caldwell, and the 6th apartment was leased to a tenant named Pike, and in both instances full commissions for the services were paid by defendant. The situation, therefore, was that, of the four apartments mentioned in Bradley's letter of May 22, 1916, three had been rented, and full commissions for the services had been paid plaintiffs by defendant, leaving the 4th apartment still unrented. On May 22, 1917, the 4th apartment was leased to a tenant named Hurlbut for a period of three years at a monthly rental of \$375.

At the trial plaintiffs claimed that there was due them the sum of \$270, as commissions for procuring the Hurlbut lease,

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and also the sum of \$400, for the "bonus" mentioned in Bradley's letter of May 22, 1916, inasmuch as all four apartments had been leased, either through Bradley's efforts or the efforts of an agent of plaintiffs, named Dorris. The latter entered plaintiffs' employ shortly after January 1, 1917, remaining with plaintiffs, as an assistant to "follow up prospects" until May 12, 1917, when he left and immediately entered into the real estate brokerage business on his own behalf. It is apparent from the finding and judgment that both of plaintiffs' claim were allowed by the trial court.

The defendant contended in substance in the trial court, and here contends, that the Hurlbut lease was secured through the efforts of Dorris after he had left the employ of plaintiffs; that defendant, at the time he accepted the Hurlbut lease through Dorris, had a right to accept Dorris as a broker; and that, inasmuch as the "bonus" agreement, as modified, provided that Bradley should "turn in the remaining three leases" by October 1, 1916, which was not done, the defendant did not owe the plaintiffs anything.

On the question whether or not plaintiffs were the procuring cause, either through their own efforts or the efforts of Dorris while an employee of plaintiffs, in securing the Hurlbut lease for defendant, much testimony was heard. Mr. Bradley testified, in substance, that during the month of April, 1917, both he and Dorris had several interviews with Hurlbut in the endeavor to get him to take a lease of the 6th apartment (afterwards rented to Pike) but that Hurlbut finally said he did not want it; that he (Bradley) did not again communicate with Hurlbut about renting any apartment in defendant's building until after Dorris had left plaintiffs' employ on May 12th, when he (Bradley) again took up negotiations with Hurlbut and endeavored

to get him to lease the 4th apartment; that on May 11th, the day before Dorris left plaintiffs' employ, he (Bradley) called on defendant and told him that Dorris was going to leave plaintiffs' employ, that Dorris had been negotiating with Hurlbut, that he (Bradley) was afraid that Dorris might consummate a lease to Hurlbut himself and claim commissions, and that if defendant accepted the Hurlbut lease through Dorris plaintiffs would protest and claim commissions on it; that defendant replied that "there were two sides to the question, that all he was interested in was securing that lease for his apartment, and that he would take the lease from whoever brought it in." Mr. Martin, the defendant, testified in substance that about the middle of May Dorris called and said that he had recently left plaintiffs' employ and had gone into the brokerage business on his own account, and asked if the 4th apartment was still vacant and if defendant had an exclusive contract with plaintiffs; that he (defendant) replied that said apartment was still unrented, that he had no exclusive contract with plaintiffs and that he would be glad to have Dorris endeavor to lease the apartment on the same basis as other brokers; that Dorris then said he would try and lease the apartment; that early in the day that the Hurlbut lease was signed (May 22) Dorris again called and informed him that Hurlbut would not rent the 4th apartment for \$400 a month, but would only consider it for a three year term at a monthly rental of \$375; that defendant then told Dorris that he would accede to those terms; that Dorris then presented a lease prepared by him and defendant signed it and Dorris left; that in the afternoon Dorris returned with the lease signed by Hurlbut; that he (defendant) prior to the execution of the lease knew that Dorris had been in the employ of plaintiffs, but that he did not know that as such employee he had made any efforts to lease the 4th apartment to Hurlbut. Mr. Hurlbut

testified, in substance, that the apartments in defendant's building were first brought to his attention by a broker named Lindahl; that later he had some negotiations with plaintiffs regarding renting the 6th apartment but that he finally decided not to rent it; that after Dorris had left plaintiffs employ he had some negotiations with him regarding renting the 4th apartment, which finally resulted in the signing of the lease, presented to him by Dorris.

After a careful review of the evidence we have reached the conclusion that plaintiffs were not the procuring cause in securing the Hurlbut lease to the 4th apartment in defendant's building. While by the agreement of May 22, 1916, plaintiffs' predecessor in business (Bradley) had the exclusive right to secure leases for the four apartments in defendant's building, that right expired by the express terms of the agreement on October 1, 1916. Indeed, by the modification of that agreement, made September 14, 1916, such exclusive right no longer existed. Other brokers had the apartments listed on their books, and this plaintiffs knew in October, 1916. We think it clearly appears that Dorris, by the efforts he made after he left plaintiffs' employ, secured Hurlbut as a tenant for the 4th apartment. And we do not find in the record any evidence of fraud or unfair dealing on the part of defendant towards plaintiffs in allowing Dorris, after he had left plaintiffs' employ, to negotiate with Hurlbut or anybody else for the leasing of said apartment.

And we are of the opinion that the evidence clearly shows that plaintiffs are not entitled to a bonus of \$400 or in any amount. The only possible foundation for such a claim is contained in the agreement of May 22, 1916. That agreement expired by its express terms on October 1, 1916, and was never renewed. And at the time of its expiration the conditions under

which the bonus became payable did not exist. The judgment must be reversed.

REVERSED.

184 - 24531

FINDING OF FACTS.

We find as facts in this case that plaintiffs were not the procuring cause in securing the Hurlbut lease to the 4th apartment in defendant's building, and we also find that the contract for the bonus of \$400 expired October 1, 1916, and was not continued in force, and that the conditions under which it was payable did not exist on or before said date.

193 - 24541

ROYAL C. WISE,
Plaintiff in Error,)

vs.)

NATIONAL OXYGEN COMPANY,
a corporation,)
Defendant in Error.)

ERROR TO MUNICIPAL COURT
OF CHICAGO.

215 I.A. 636

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In this case the trial court, after a hearing, entered a finding and judgment in favor of the defendant, and plaintiff by this writ of error seeks to reverse the judgment.

In his statement of claim plaintiff alleged that he sold and shipped to defendant at Detroit, Michigan, on March 3, 1916, one No. 4, 300 pound, Hall compressor, at a price of \$230. and that on subsequent days in said month he sold and shipped to defendant certain packing at the total price of \$69.28, none of which sums had been paid. The defendant, in its affidavit of merits, admitted that it was indebted to plaintiff in the sum of \$69.28 for said packing, but denied that it owed plaintiff anything for the No. 4 compressor. After the suit was brought defendant paid plaintiff the amount claimed for the packing.

After a review of the record we are of the opinion that the trial court was justified in entering the finding in favor of the defendant. We think it was shown by a preponderance of the evidence that after the sale and delivery to defendant of the No. 4 compressor (for the price of which plaintiff sued) it was found that none of the three No. 10 compressors, previously sold to defendant and for which it had paid plaintiff, would work properly; that defendant notified plaintiff of that fact, and that it would not pay plaintiff for said No. 4 compressor until said No. 10 com-

889 2 019

pressors were made to work properly; that after some negotiations plaintiff agreed with defendant that defendant should ship one of said No. 10 compressors (then at Muskegon) to defendant's plant at Clearing, Illinois, that a test of said compressor should there be made, and that if at that test it was found that said compressor would not compress oxygen or hydrogen to a pressure of 1800 pounds to the square inch, plaintiff would exchange said No. 4 compressor and other similar No. 4 compressors at their market price for said three No. 10 compressors; that defendant shipped the No. 10 compressor, which was at Muskegon, to its plant at Clearing and that a test of the same was there had, at which time plaintiff was present; that at such test it was found that said compressor would not and did not compress oxygen and hydrogen to the required pressure; and that plaintiff has not since made the exchange of compressors as agreed, although defendant is ready and willing so to do.

The point is made that defendant, before it can successfully make the defense as above outlined to plaintiff's claim, must show that it has tendered to the plaintiff said No. 10 compressor, which at the time of said test was in its possession at its plant at Clearing. It appears that at the time of the trial said compressor was at defendant's plant, but was not being used. We do not think that a formal tender of said compressor by defendant was necessary in order for defendant to make its defense. Plaintiff brought the present suit after the test had been had, and after he had refused to perform his agreement. A formal tender would have been an useless act.

On the hearing of the motion for a new trial on the ground of newly discovered evidence, plaintiff presented his affidavit, showing that "some time before" the suit was commenced he made inquiry of the president of defendant as to the whereabouts of a former manager of defendant and that said president told him he

did not know where said manager then was located; that since the trial he had ascertained that said manager had been in Chicago all the time and that his testimony was very material to the issues in the case. The affidavit of said manager was also presented. It is urged that defendant's president misled plaintiff as to the whereabouts of said manager and on that account he was not produced as a witness. There is no merit in the contention. It does not appear that said president then knew where said manager was. And plaintiff makes no showing of diligence in searching for him immediately before and at the time of the trial. Furthermore, it does not appear from said manager's affidavit that he knows anything about the making or not making of the agreement between the parties as to the test of the compressor, or the results of the test.

The judgment is affirmed.

AFFIRMED.

202 - 24551

KEELEY BREWING COMPANY,
a corporation,

Appellee,

vs.

ANNIE MASLA, also known as
ANNIE ENDEIKIS,

Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

215 I.A. 636

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an action to recover the sum of \$2,149.50, being a balance claimed by plaintiff to be due for certain beer sold and delivered to the defendant. In her affidavit of merits the defendant claimed that she had a good defense to a part of plaintiff's demand, viz. \$1204.50, thereby admitting that she was indebted to plaintiff in the sum of \$945. A trial was had before a jury, resulting in a verdict for the plaintiff for the full amount of its claim, upon which verdict judgment was entered and defendant appealed.

It appears that defendant had been purchasing beer from the plaintiff, for consumption in her saloon, from October, 1912, until sometime in May, 1915, when she stopped making further purchases. The only dispute between the parties was concerning the beer sold and delivered prior to January 1, 1915, plaintiff claiming that on that date there was a balance due it of \$1204.50, and defendant claiming that she had paid for all beer delivered prior to said date. The sum of \$945, which defendant admitted she owed plaintiff, was for balance due for beer delivered during the period from January 1, 1915, until the time in the following May when defendant ceased making further purchases. It was the custom of plaintiff to furnish defendant, each year, with a small "beer book," in which were noted from time to time

1. The first part of the report is a general statement of the purpose and scope of the study.

2. The second part is a description of the methods used in the study.

3. The third part is a description of the results of the study.

4. The fourth part is a discussion of the results and their implications.

5. The fifth part is a conclusion and a list of references.

6. The sixth part is a list of appendices.

7. The seventh part is a list of figures and tables.

8. The eighth part is a list of footnotes.

9. The ninth part is a list of acknowledgments.

10. The tenth part is a list of references.

11. The eleventh part is a list of appendices.

12. The twelfth part is a list of figures and tables.

13. The thirteenth part is a list of footnotes.

14. The fourteenth part is a list of acknowledgments.

15. The fifteenth part is a list of references.

16. The sixteenth part is a list of appendices.

17. The seventeenth part is a list of figures and tables.

18. The eighteenth part is a list of footnotes.

19. The nineteenth part is a list of acknowledgments.

20. The twentieth part is a list of references.

21. The twenty-first part is a list of appendices.

22. The twenty-second part is a list of figures and tables.

23. The twenty-third part is a list of footnotes.

24. The twenty-fourth part is a list of acknowledgments.

25. The twenty-fifth part is a list of references.

26. The twenty-sixth part is a list of appendices.

the number of barrels of beer delivered and the date.

Plaintiff produced as a witness one of its book-keepers, who, with plaintiff's books before him, testified as to the number of barrels of beer delivered to defendant and the prices charged therefor, and that on December 31, 1914, for beer previously sold and delivered, there was a balance then due from defendant of \$1204.50. He further testified that on said date he compared the defendant's ledger account with the "beer book" of defendant for the year 1914, that both then showed said balance to be due plaintiff, and that subsequently said 1914 "beer book" was returned to defendant.

The defendant was the only witness in her own behalf. She testified in substance that she did not keep any books; that the only book she had showing her dealings with plaintiff was the "beer book"; that after she received a new "beer book" for the new year she generally destroyed the one for the preceding year; that she burned the 1914 "beer book" sometime in February, 1915; and that during the month of December, 1914, she paid plaintiff in full for all beer for which she then owed plaintiff. Defendant's "beer book" for 1915 was introduced in evidence, marked defendant's exhibit A. The original was certified and transferred to this court for inspection. It is now before us. The first page thereof, headed "January 1915" does not show any balance due plaintiff on January 1, 1915, but there appear evidences of certain ink writing on the first line having been erased, and over the seeming erasure are written in pencil certain words. The first page also shows the number of barrels of beer delivered during January, 1915, and the respective dates of delivery. The second page shows the number of barrels delivered during February, 1915, and certain payments made. The third, fourth and fifth

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pages show the number of barrels delivered during the months of March, April and May, respectively.

In rebuttal plaintiff produced as a witness James I. Innis, a microscopical expert, who testified as to defendant's exhibit A, "there has been an erasure; there is evidence of scraping, the use of a chemical on that top line, because the sizing has been removed from the surface of the paper," and that there is an appearance of red ink having been erased or removed by means of a chemical. M. J. Kerns, an agent of plaintiff, testified in substance that sometime in January, 1915, he called on defendant and talked to her about paying her account; that he then saw the book, exhibit A, in defendant's possession; that there then was written in red ink, at the head of the first page thereof, a balance, carried over from the previous year, due plaintiff of over \$1200; that he again called on defendant in May, 1915, after she had stopped buying beer of plaintiff, told her she owed over \$2100, and demanded payment, and that she replied she would soon call at plaintiff's office and "fix it up." Andrew J. Bracken, clerk for plaintiff, testified in substance that before defendant's "beer book", exhibit A, was delivered to her, he personally wrote on the top line of the first page, under the heading "January, 1915," an item in red ink, showing the balance due plaintiff carried over from the preceding year; that besides the word "balance" he also wrote the amount; but that he did not remember what that amount was. The defendant, being again called as a witness, testified that nothing had ever been written in said book, exhibit A, in red ink.

In his brief and argument here filed, counsel for defendant urges two grounds, and only two, for a reversal of the judgment.

As to the refusal of the trial court to allow answers to certain questions asked of defendant on her direct examination, we do not think there was reversible error. If any error there was, it was rendered harmless by the introduction later of defendant's "beer book" for the year 1915, and by other testimony given by defendant.

After the jury had retired to consider its verdict they, on the same day, returned with an inquiry in writing, addressed to the court, wherein they asked the amount claimed by plaintiff. Thereupon the court, of its own motion, gave to the jury in writing the following instruction: "The full amount of the plaintiff's claim is \$2149.50." Counsel contends that the giving of this instruction, in response to the inquiry of the jury, is reversible error, on the ground that it was misleading and tended to convey the impression to the jury that this was the amount to which plaintiff was entitled. Under the facts disclosed in this record we see no force in the contention. Furthermore, for aught that appears, counsel for defendant may have been present at the time the instruction was given, and it does not appear that he made any objection at that time or subsequently to the giving of the same. (Shaw v. Camp, 160 Ill. 425-430; City of Joliet v. Looney, 159 Ill. 471-475; Lee v. Quirk, 20 Ill. 392-395; Crowell v. People, 190 Ill. 508-514; 11 Ency. Pl. & Pr. 284.)

Finding no reversible error in the record the judgment is affirmed.

AFFIRMED.

LOUIS H. HEINBERG,
Plaintiff in Error,

vs.

HERBERT BICKLOW and J.
CARLTON ABBOTT,
Defendants in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

215 I.A. 636

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought this tort action in the Municipal court of Chicago against the defendants for the alleged wrongful conversion of \$500. At the close of plaintiff's evidence the court directed a verdict for the defendants, upon which verdict judgment was entered, and plaintiff sued out this writ of error.

The parties entered into a written contract on June 17, 1915, in which the defendants were called party of the first part and plaintiff party of the second part, which contract is as follows:

"Whereas, the party of the first part purposes organizing and promoting a corporation to engage in the business of producing motion picture photo plays and manufacturing and selling motion picture films and supplies, which corporation is to be called the Daisy Film Company and is to be capitalized at the sum of One Hundred thousand dollars (\$100,000) with the par value of its stock fixed at One Hundred dollars (\$100) per share, and

Whereas, the said incorporators desire to secure funds with which to complete the organization of said company and also to carry on its operations. It being agreed that party or parties subscribing such funds will receive two shares of stock, upon the completion of the organization, for every \$100 invested.

Now Therefore, the party of the second part having subscribed \$500, it is agreed that the party of the first part shall deliver to the party of the second part ten shares of stock at the par value of \$100 per share, upon the completion of said corporation."

Plaintiff, in his statement of claim alleged, in substance, that in pursuance of said contract he paid to defendants the sum of \$500; that he has demanded of the defendants that they deliver to him ten shares of the capital stock of the Daisy Film

Company, but that they have refused so to do; that no corporation known as the Daisy Film Company was ever organized by defendants; that said contract was not entered into in good faith on the part of the defendants, but with the intent to cheat and defraud plaintiff out of said \$500; and that defendants by their conduct have been guilty of wrongfully, maliciously and fraudulently converting to their own use the said \$500.

Plaintiff testified in substance that he paid to defendants the said sum of \$500; that he was employed by the Daisy Film Company (unincorporated) as bookkeeper; that the \$500 which he paid in was used to pay the help and that it was the only money paid in while he was with the company; that the corporate organization of the Daisy Film Company was never completed, and that no stock in the corporation was ever delivered to him; that so far as he knew neither of the defendants ever received any part of the \$500 which he paid in; that the money was expended in the attempted promotion of the corporation; that when the unincorporated company quit business there were a number of debts; that he demanded of the defendants the promised stock in the corporation, or the return of his \$500 with interest, and that the demand was refused.

We fail to find in the record any evidence of any intent on the part of the defendants to cheat and defraud plaintiff out of his \$500, or that the defendants were guilty of any wrongful conversion thereof. It appears that the money was used to promote the company and to carry on its operation, and was so used with plaintiff's consent. To maintain trover a plaintiff must show a tortious or wrongful conversion. (Hayes v. Ins. Co. Life Ins. Co., 125 Ill. 626-633; Sturges v. Keith, 57 Ill. 451-456.)

The judgment is affirmed.

AFFIRMED.

231 - 24581

ECONOMY PUMPING MACHINERY CO.,
Appellee,

vs.

SWEDISH-AMERICAN TELEPHONE
MANUFACTURING CO.,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

215 I.A. 637

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On April 10, 1918, plaintiff commenced an action in the Municipal court of Chicago against defendant to recover the sum of \$210, for the purchase price of a certain vacuum pump sold and delivered to defendant and installed in its plant. The defense was that there was a breach of the implied warranty that the pump should be reasonably fit for the purpose for which it was intended to be used. There was a trial before the court without a jury, resulting in a finding in favor of plaintiff and the entry of a judgment for \$210 against defendant.

In the early part of January, 1917, defendant was having some trouble with the operation of the steam heating system in its factory. The pump used to facilitate the return of water to the boiler was worn out and did not work. Several manufacturers of pumps, including plaintiff, were communicated with. R. H. Thomas, an engineer and president of plaintiff, and W. W. Huggins, secretary of plaintiff, called on defendant, had interviews with F. J. Ruhlman, purchasing agent of defendant, and F. W. Pardee, president of plaintiff, and inspected defendant's heating system. Thomas testified: "I observed some of the traps had the tops of them cracked and had been opened many times. I concluded that they were having trouble with the traps. I told Mr. Pardee that we had a pump that would relieve his situation and save him some coal, but that it would be necessary for him

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to have the traps gone over and the plant generally overhauled. I explained the operation of the pump, the way it would draw water and air from the system, and incidentally told him why it would not draw water from the system if the traps were left in the condition they were." Huggins testified: "I was present during the conversation between Mr. Thomas and Mr. Pardee. Mr. Thomas told Mr. Pardee that certain traps were needing repair; * * that the pump would not improve conditions unless they were repaired. Mr. Pardee said that he would have the traps fixed." On January 12, 1917, defendant ordered the pump of plaintiff by telephone, and on the same day mailed plaintiff a confirming order in writing. The order was not introduced in evidence, but the letter accompanying the same, signed by Pardee as president of defendant, was introduced, and is in part as follows: "We enclose confirming order, No. 3656, for one of your 5 X 5 automatic control, bolt drive, vacuum and boiler feed pumps, as shown in figure No. 2149 in your circular. As your Mr. Thomas and Mr. Huggins have been out here and have seen our situation, we are placing this order with the understanding that you will positively guarantee your pump to be what we need and that you guarantee it to properly perform the work which is necessary in order to make our vacuum system work economically and successfully. * * The price, we understand, is \$210, without motor, which we are furnishing." Shortly thereafter the pump was shipped, accepted by defendant, installed and put into operation by defendant in its plant. It does not appear that any of the repairs in defendant's heating system, suggested by Thomas as necessary for the successful operation of the pump, were made by defendant before the pump was put into operation. During the night following the day that the pump was connected with the system and put into operation there was a flood of water in the boiler and engine rooms, and water came from the radiators on several floors in defendant's factory. On

the following day plaintiff was advised of these facts by telephone and Thomas immediately went to the plant. He testified in substance that he found that one of the employees of defendant had taken the "screen off the strainer"; that he put the screen back; that he found that "the piston rod was broken, due to the lodgment of grit and cinders that got into the pump when the screen in the strainer was removed"; that he had a new piston rod put in; that he found that the heating system generally was out of order; that there was water in several places on the floor where the traps were; that he "cleaned out^{of} some of the pipes as much as two handfuls of grit and pipe scale"; that he "found some of the bolts were entirely out of the traps and those were leaking badly"; and that he reported this to Fardee and urged that the defects in the system be remedied. Fardee testified in substance that after Thomas' visit the "flooding part stopped, but we could not get water out of the pipes"; that subsequently "we monkeyed with a lot of different things"; that the heating system was not overhauled or cleaned out, although "we tried to fix some of the valves," and some of the traps which were out of order were subsequently fixed up. On February 20, 1917, plaintiff wrote defendant as follows: "We are holding ourselves in readiness to test out the vacuum pump we sold for connection with your heating system. The condition of your order is that we should make this demonstration for you and time is going by and the opportunity for making the test may be missed if not done soon." To this letter defendant, per Fardee, replied on the following day in part as follows: "Replying to yours of February 20th * * we beg to call your attention to the fact that we have not accepted the vacuum pump, and do not want to accept it, and that it is held subject to your instructions on account of its unsatisfactory operation. The writer understood from your Mr. Thomas that you would like a further opportunity of demonstrating this pump to us; * *

the writer told Mr. Thomas that we would be glad * * to give you the opportunity * * as soon as we can get our traps fixed up. All of the repair parts necessary for these traps have been ordered, but have not yet been received, so the traps are not fixed. It is useless to make any demonstration until this work is done. We will notify you when it is done."

It does not appear that defendant ever advised plaintiff that the traps had been fixed so that a test could be made. In the month of April, 1917, Pardee ceased acting as president of defendant and was succeeded in that office by W. R. Keene. Subsequently Thomas called on Keene, but Keene refused to see him. Keene testified in substance that in the early part of the fall of 1917 he started the pump in operation; that it pumped no water, but sucked air in the place of water; that the pump was then taken apart; that it was found to be "in good shape"; that "apparently there was nothing the matter with it"; that it was again connected up, but it kept on sucking air and not water and that subsequently defendant discontinued the use of it.

On March 12, 1918, more than a year after the pump had originally been installed, defendant returned the same to plaintiff. It was brought to plaintiff by some teaming company and at the time of its receipt plaintiff did not know from whom it came or what particular pump it was. Huggins, secretary of plaintiff, testified that it "was delivered as coming from the teaming company with no other identification on the tags and it was received"; that it is "still held awaiting orders"; and that he "had no idea where the pump came from, as we get pumps every day and hold them for orders."

After a careful review of the record we are of the opinion that the trial court was right in entering the finding and judgment. We think the defendant failed to show by a preponderance of the evidence that the pump was not reasonably fit for the purpose for which it was intended to be used by defendant. The evidence

rather tended to show that the failure of the pump to work satisfactorily was caused by defects in defendant's heating system. Plaintiff did all it could to get those defects remedied, and, if they were ever in fact remedied, was refused an opportunity thereafter of making a test of the pump. And we think the measure of damages under the facts disclosed is the purchase price of the pump. (Uniform Sales Act, Rev. Stat. Ill., Chap. 121a, Sec. 63, Clause 1; Bagley v. Findlay, 82 Ill. 524; Osgood v. Skinner, 211 Ill. 229-239; International Filter Co. v. Hartman, 141 Ill. App. 239-250.)

The judgment is affirmed.

AFFIRMED.

273 - 24624

MORRIS PATRICK,
Appellee,

vs.

HARRY BOSHES and HARRIS LEVY,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

2151A 637

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On January 14, 1916, plaintiff brought an action in case in the Circuit court of Cook County against Harry Boshes and Harris Levy, trading as Boshes & Levy, Katherine L. Tuohy, and the Best Brewing Company, a corporation, under Section 9 of the Dram Shop Act. Before the trial the suit was dismissed as to Katherine L. Tuohy and the Best Brewing Company. The jury returned a verdict in favor of plaintiff for \$1000, upon which judgment was entered and defendants appealed to this court.

In his declaration plaintiff alleged, in substance, that on August 23, 1915, the defendants conducted a dram shop upon premises known as 3161 West 12th street, Chicago; that Katherine L. Tuohy was the owner of the premises and had leased the same to the Best Brewing Company; that said Best Brewing Company had sub-let the premises to Harry Boshes and Harris Levy, where they were engaged in the business of selling intoxicating liquors; that said defendants did sell or give intoxicating liquors to one Thomas Johnson which in whole or in part did cause said Johnson to be and become intoxicated; that said Johnson, while so intoxicated, did then and there violently attack and assault plaintiff, and did wilfully and violently strike the face and eyes of plaintiff with a glass, thereby greatly injuring plaintiff and causing him to lose the sight of his left eye and thereby impairing the sight of his right eye; that as the result thereof plaintiff has suffered great pain in body and mind, has

been prevented from entering into his usual occupation for the support of himself and his wife, and has suffered financial loss, etc.

The evidence discloses that the defendants, Boshes and Levy, conducted a saloon at 3161 West 12th street, Chicago; that plaintiff while in said saloon on the evening of August 23, 1915, was assaulted by one Thomas Johnson and struck in the left eye with a glass, resulting in the total loss of the sight of said eye and also injuring plaintiff in his means of support, and that at the time Johnson was intoxicated.

It is contended that there is not sufficient proof in the record that the defendants either sold or gave to Johnson any intoxicating liquors which in whole or in part caused him to become intoxicated. We think that there is. There is testimony showing that Johnson had been in the saloon during the afternoon, and during the evening prior to the altercation, which occurred about 8:30 o'clock; that he had been drinking considerably and had become very boisterous; and that just prior to the altercation he was standing in front of the bar drinking a glass of beer. One of plaintiff's witnesses testified that "just before the trouble started" the defendant Levy was behind the bar serving drinks to the customers; that Levy told Johnson, "Don't bother my customers; you can't get any more drinks"; that Levy then gave him a "glass of beer and he wanted a glass of whiskey"; that Johnson "ordered whiskey," and Levy "refused to give him whiskey and gave him a glass of beer"; and that at the time Johnson was "pretty drunk" and "was looking all the time for trouble." Plaintiff testified that about the same time Johnson "was swearing at somebody for not buying him a drink," and that Levy then said, "You have been bothering my customers now all the afternoon; that is the last drink you will get."

We have carefully considered the other two points urged by counsel as grounds for reversal, viz: That plaintiff was guilty of contributory negligence and that the court admitted improper testimony of a physician, called as a witness for plaintiff, and are of the opinion that the points are without merit. The judgment is affirmed.

AFFIRMED.

282 - 24633

GEORGE M. RATNER,
Appellee,

vs.

M. KAPLAN,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

215 I.A. 637

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On February 15, 1918, plaintiff commenced a contract case in the Municipal court of Chicago against M. Kaplan and E. E. Walsh, defendants, to recover the sum of \$125. In his statement of claim plaintiff alleged that his claim was for services rendered the defendants, at their request, on September 27, 1917, and on prior dates, in auditing the books of, and making an accounting thereof to, the defendants, trading as the E. E. Walsh Leather Co.; that the value and price of said audit became an account stated between plaintiff and defendants on said date in the sum of \$125; and that said sum had not been paid, notwithstanding many requests for payment. The cause was tried before the court without a jury, and at the conclusion of the hearing the court dismissed the suit at plaintiff's costs as to Walsh, and found the issues against Kaplan, and assessed plaintiff's damages at the sum of \$125. Motions by Kaplan for a new trial and in arrest of judgment were made and overruled, and judgment on the finding was entered.

The plaintiff testified, in substance, that at Kaplan's request he audited the books of the E. E. Walsh Leather Co., which firm, as Kaplan informed him, consisted of Kaplan and Walsh; that he commenced the work on July 20, 1917, and completed the same about September 18, 1917; that he worked 78 hours in all in making the audit; that he knew that Kaplan was going to use the audit in connection with a contemplated action by Kaplan against

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 the sum of \$100.00
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Walsh for an accounting; that on turning over the audit to Kaplan the latter signed a certain paper, and that he had frequently requested Kaplan to pay the amount due him. The paper referred to was introduced in evidence and is as follows:

"Received of G. M. Ratner accountant's report of the E. E. Walsh Leather Co., for which I owe the above Mr. Ratner the sum of \$125.

September 27, 1917.

M. Kaplan."

At the conclusion of plaintiff's evidence Kaplan moved for a dismissal of the cause as to him, solely on the ground that plaintiff "had not made out a case."

Kaplan testified that on the day he signed said receipt he told plaintiff he signed it "with the understanding that if the money for this audit comes out of the receivership of the E. E. Walsh Leather Co., you get \$125 for your work, but if I have to pay for it personally I only pay \$50," to which plaintiff replied, "that is agreeable." Plaintiff denies making any such agreement at the time the receipt was signed.

Two grounds for a reversal of the judgment are here made and argued in the brief of Kaplan's counsel: (1) That the court erred in refusing to consider certain evidence offered by Kaplan that the paper referred to was not the entire contract between the parties, and (2) that the court erred in entering the judgment against Kaplan individually, when a joint liability of two partners for a partnership debt was alleged and no amendment to the statement of claim was requested or filed by plaintiff.

As to the first point an examination of the bill of exceptions discloses that the court admitted all the evidence offered by Kaplan. As to the second point we are of the opinion that the same is not well taken. The proof disclosed that Kaplan alone was liable, and it does not appear that the alleged variance

between the statement of claim and the proof was ever called to the trial court's attention, or that there was a motion made to exclude the evidence on the ground of a variance. "The general rule at common law is, that, under a declaration against two and a joint plea, the plaintiff cannot recover without establishing the joint liability. * * Although the declaration remained as a declaration charging a joint liability against the two defendants, yet this was a matter of variance merely. The proof showed that only one defendant was liable. The declaration averred that both were liable. Appellant should, therefore, have moved to exclude the evidence on the ground of a variance; but he did not do so. If the objecting party desires to raise the question of variance, he must indicate it specifically in his objection, and point out in what it consists, so as to enable the court to pass upon the question intelligently, and also so as to enable the plaintiff to amend his pleadings to make them conform to the evidence." Mayer v. Brensinger, 180 Ill. 110-117. See also Carnegie v. Dawney, 178 Ill. App. 413-414.

The judgment is affirmed.

AFFIRMED.

288 - 24639

WILLIAM JENSON, ALBERT H.
MANNING and MAX D. BOLFF, doing
business as Regelin, Jenson & Co.,
Appellees,

vs.

RAYMOND A. von DANZEN,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

215 I.A. 637

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

The plaintiffs, as licensed real estate brokers, brought this action in assumpsit against defendant to recover the sum of \$1500 as commissions for procuring for defendant a purchaser for a certain leasehold estate in certain premises located in Chicago. The declaration consisted of a special count and the common counts, to which defendant by an attorney filed a plea of the general issue. Subsequently defendant filed an affidavit of merits supporting his plea, and later the defendant's attorney was given leave to withdraw his appearance as such attorney. The case was called for trial on April 3, 1918, but neither the defendant nor any attorney representing him was present. Plaintiffs offered evidence in support of their claim. No evidence on defendant's behalf was presented. The trial court instructed the jury to return a verdict finding the issues for the plaintiffs and assessing their damages at the sum of \$1500, which the jury did, and the court entered judgment upon the verdict against the defendant. On April 8, 1918, defendant filed his written motion to set aside the judgment and for a new trial, which motion was denied and defendant excepted and prayed and perfected this appeal.

In the bill of exceptions no evidence taken on the trial is preserved. The errors assigned are in substance that the trial court erred (1) in calling the case for trial before issue was joined in the absence of defendant. (2) in instructing

the jury to find for the plaintiffs in the sum of \$1500, and (3) in denying defendant's motion to vacate the judgment and for a new trial.

The cause seems to have been at issue, as disclosed from the pleadings, when the hearing was had. The filing of a similitur was not necessary. (Strause v. Owen Belt & Appliance Co., 64 Ill. App. 435; Gillespie v. Smith, 29 Ill. 473-476.) And when a cause is regularly called for trial it is the business of the defendant to be present and it is not error for the court to proceed in his absence. (Hazen v. Pierson, 83 Ill. 241-242.)

Where the bill of exceptions does not contain the evidence heard on the trial, but does show that evidence was introduced on behalf of the plaintiff, it will be presumed that the evidence was ample to sustain the judgment. (Miller v. Glass, 118 Ill. 443; Law v. Sanitary District, 197 Ill. 523-530.) And where the defendant fails to introduce any evidence in defense of the prima facie case made by plaintiff it is not error for the court to direct a verdict for the plaintiff. (Evans v. Evans, 163 Ill. App. 203-209; Derby v. Peterson, 128 Ill. App. 494-495.)

And the bill of exceptions does not disclose any sufficient reason for vacating the judgment and granting a new trial.

Finding no error in the record, the judgment is affirmed.

AFFIRMED.

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306 - 24657

WILLIAM BUCHANAN,
Appellee,

vs.

CHICAGO HEIGHTS LUMBER
COMPANY,
Appellant.

APPEAL FROM COUNTY COURT
OF COOK COUNTY.

215 I.A. 638

MR. JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

Plaintiff, doing business at Texarkana, Arkansas, commenced an action in assumpsit in the County court of Cook County against the Chicago Heights Lumber Co., a corporation, doing business at Chicago Heights, Illinois, defendant, to recover damages for failure of the defendant to accept and pay for certain lumber. In his declaration plaintiff alleged in substance that on April 28, 1916, he sold to defendant three cars of lumber to be delivered to defendant in two weeks at Steger, Illinois, to be paid for on delivery; that the time of delivery was thereafter extended for a reasonable time by defendant; that although plaintiff within a reasonable time, to-wit, on June 16, 1916, tendered said lumber to defendant, the latter refused to accept and pay for the same; that thereafter plaintiff resold the lumber in the open market at a loss and for less than the contract price; and that because of defendant's failure to accept the lumber plaintiff was obliged to and did pay demurrage, etc. The defendant filed a plea of the general issue. The case was tried on July 6, 1918, before the court without a jury, resulting in a finding in favor of plaintiff in the sum of \$304, upon which finding judgment was entered, and defendant perfected this appeal.

830 AL 510

The case was tried upon an agreed statement of facts supplemented by the oral testimony of certain witnesses. The facts as disclosed from the bill of exceptions are in substance as follows:

On April 27, 1916, defendant applied to J. L. Lane & Co., lumber brokers in Chicago, to purchase through them the lumber in question. Lane wired plaintiff at Texarkana asking for prices and stating that delivery F. O. E. Steger, Illinois, was to be completed in two weeks. Plaintiff replied, giving prices and accepting the conditions as to time and place of delivery, and defendant on April 28th sent a written order for the lumber, in which it was stated that "time is of the essence of this order," and that the lumber "must be in transit within 2 weeks from date of this order." Not hearing from plaintiff, defendant on May 8th (before the expiration of said two weeks) wrote plaintiff inquiring when shipment could be made. Plaintiff replied under date of May 11th that he had inquired of his mill and had been advised that the lumber was awaiting a Missouri Pacific "box car" and that he hoped to furnish invoices within a few days. On May 17th (after the expiration of said two weeks) defendant wrote plaintiff: "If we do not receive invoices on or before May 21st, you may cancel this order." On May 20th plaintiff replied, writing that the order had been placed with his Minden mill, that he felt "pretty sure" the shipment would be made with little delay, and that "the car" might have been "delayed some on account of car shortage," as he had not been getting many "box cars." In the meantime, on May 18th, Lane, the broker, had written plaintiff to "hustle" the shipment, and that plaintiff had better wire defendant the "car numbers." On May 22nd defendant, replying to plaintiff's letter of May 20th, wrote plaintiff: "It appears that you are slightly confused regarding this order. You would experience difficulty in getting 75,000 feet in one car. It is not

necessary that this stock should be shipped in a box car. If you can load it on a flat, gondola or cattle car immediately, it will be greatly appreciated." On May 23rd plaintiff wrote defendant: "We made a mistake in saying that the car might be delayed some on account of car shortage. We meant that the order might be delayed some. We have instructed our mill that it will be satisfactory to load this order in any kind of equipment. * * We hope to be able to pass you shipping papers within a short time." Not hearing anything further from plaintiff for over a week, defendant on June 2nd telegraphed plaintiff: "Wire us car numbers. * * Important." Not getting a reply to this telegram, defendant on June 5th at 11:30 o'clock A. M. again telegraphed plaintiff: "Wire immediately car numbers. * * Must have reply today. * * Can place elsewhere, immediate shipment, less money. * * Do not wish to cancel order unless absolutely necessary." Although this telegram was received by plaintiff at 1:30 o'clock P. M. on June 5th, plaintiff did not answer same until 3:25 o'clock in the afternoon of June 6th, when he wired defendant that he was "loading" the lumber, and giving the numbers of two cars. This telegram was not delivered to defendant until the morning of June 7th. In the meantime defendant, not getting replies to its telegrams of June 2nd and June 5th, wired plaintiff at 3:48 o'clock in the afternoon of June 6th to "cancel" the order. This telegram was received by plaintiff about five o'clock on the afternoon of June 6th, but after plaintiff had sent his wire to defendant of the same date that he was "loading" the lumber. On the morning of June 7th, at 10:49 o'clock, defendant again wired plaintiff that it would "not accept any stock" shipped on the order. The cars were first set on the tracks for loading at plaintiff's mill about noon of June 6th, but were not completely loaded and released for shipment

until the evening of June 7th at six o'clock, when bills of lading for three cars of lumber, consigned to defendant at Steger, Illinois, were issued to plaintiff by a railroad company. On June 8th plaintiff forwarded the invoices for the lumber to defendant, and on June 12th defendant by letter returned the same to plaintiff "because this order was cancelled by wire." On June 14th plaintiff wrote defendant that, while he "might dispose of these cars elsewhere," they were now well on their way to destination, and he would insist on defendant's accepting them on arrival. The three cars, containing the grade, size and quality of lumber as ordered arrived at destination on June 17th, and were tendered to defendant, but defendant refused to accept them, and on June 20th wrote plaintiff to that effect, saying: "We have instructed the agent of the railroad company at Steger to notify you that he is holding the cars subject to your orders. We cannot accept this stock because you received notice to cancel before shipment was made." On July 3rd plaintiff wrote defendant: "We are instructing our Chicago representative to make the best possible disposition of these cars elsewhere, so as to stop demurrage and other charges, and as soon as we learn how much we have lost we will charge the amount to your account." On July 8th plaintiff's representative resold the lumber in Chicago for \$217 less than plaintiff would have realized had defendant accepted and paid for the lumber; and between June 17th and July 8th demurrage to the amount of \$87 had accrued against the lumber. The sum of these two items is the amount of the court's finding. At the close of all the evidence defendant asked the court to hold the written proposition of law that plaintiff was not entitled to recover, but the same was refused.

From the foregoing outline of the facts it will be noticed that defendant ordered the lumber under the express condition that the same should be "in transit" within two weeks; that

after the two weeks had passed and it appeared that the lumber had not even been loaded in cars, defendant impliedly extended the time to a day certain, viz, May 21st; that when that date had passed and it still appeared that the lumber had not yet been loaded, defendant, on May 22nd, requested an "immediate" shipment; that on June 2nd defendant wired for the "car numbers," and again on the morning of June 5th wired plaintiff to telegraph the car numbers "immediately," thereby impliedly further extending the time of shipment not later than June 5th; and that defendant, not receiving a reply to either of these telegrams, on the afternoon of June 6th cancelled by wire the order for the lumber, which message was received by plaintiff the same afternoon and more than 24 hours before the cars were completely loaded and were started "in transit."

Plaintiff alleged in his declaration that the time for the delivery of the lumber, after the two weeks had expired, was extended for a "reasonable time" by defendant, and that plaintiff "within a reasonable time" tendered the lumber to defendant, but that the latter refused to accept the same. Under the facts disclosed we do not think that plaintiff has proven these essential allegations. And we are of the opinion that under the circumstances defendant was fully warranted in cancelling the order on June 6, 1916, and, said cancellation order being received by plaintiff more than 24 hours before the lumber had been completely loaded in cars preparatory to shipment, that plaintiff was not justified in afterwards shipping the cars to defendant and insisting upon their acceptance.

The judgment of the County court is reversed.

REVERSED.

We find as facts in this case that plaintiff did not put the lumber in transit within a reasonable time after the expiration of the time limited by the contract as extended, and that, before said lumber was put in transit by plaintiff, defendant cancelled the contract, of which cancellation plaintiff had notice before said lumber was put in transit.

ALONZO J. CUTLER,
Appellee,

vs.

NORTHERN TRUST COMPANY,
Executor of the Last Will
and Testament of Charles
F. Partridge, deceased,
Appellant.

APPEAL FROM CIRCUIT COURT OF
COOK COUNTY.

215 I.A. 638

MR. JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

On July 16, 1917, the judges of the Circuit court of Cook County entered an order directing the clerk of the court to prepare and print nine common law calendars to contain "all common law cases pending in said Circuit court on July 31, 1917." And in said order directions were given as to the order in which said cases should be entered upon said calendars. On July 31, 1917, the present case, then entitled Cutler v. Partridge, was not then pending in said Circuit court, but was pending in this Appellate court on appeal from a judgment rendered in the Circuit court in November, 1915, as appeared from the records of said Circuit court in possession of said clerk. Pursuant to said order the clerk prepared and caused to be printed, prior to the opening of the September term 1917 of said Circuit court, nine printed calendars. On one of said calendars, known as Calendar No. 5, this case was entered as No. 356. Subsequently to the printing of said calendars, and on September 18, 1917, this case was recketed in the Circuit court, this Appellate court having on July 19, 1917, reversed said judgment and remanded the case. (Cutler v. Partridge, 207 Ill. App. 321.) Subsequently to the recketing of the case the same had not been ordered placed upon any calendar of the Circuit court. At the time the case was ordered recketed the Chief Justice of the Circuit court suggested to the attorneys for the respective parties that if they would agree upon a judge, he would

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advance the case out of its order and assign it for trial before said judge. Before any action had been taken on the suggestion, the defendant Iardridge died, and on January 29, 1918, his death was suggested of record, and on February 25, 1918, the Northern Trust Company, executor, etc., entered its appearance as defendant, and an order was entered permitting it to adopt as its pleas the pleas already filed. On March 11, 1918, during the February term 1918 of the Circuit court, Judge Zeman, one of the Judges of said Circuit court, in calling said calendar No. 5, reached this case, No. 356, on that calendar, and, no one appearing on either side, dismissed the case for want of prosecution at plaintiff's costs. Neither the plaintiff nor his attorney knew that this case was on said calendar No. 5, or of the entry of the order of dismissal until March 18, 1918, the first day of the succeeding or March term, 1918, of the Circuit court. On March 20, 1918, plaintiff filed his written motion under section 89 of the Practice Act, praying that the judgment of dismissal be set aside because of an error in fact. This motion was supported by the affidavits of plaintiff, his attorney, the attorney's chief clerk, and a deputy clerk of said Circuit court who had charge of the making up of said nine calendars. An affidavit was also filed in resistance of the motion. On April 13, 1918, the Circuit court, after a hearing, entered an order setting aside said order of dismissal of March 11, 1918, and reinstating the case. In said order it is recited that the case had been placed on said calendar No. 5 by a mistake of the clerk of the Circuit court, that such case was not, under the practice of the Circuit court, subject to trial or dismissal on March 11, 1918, and that the case was dismissed by the court "under the mistaken belief" that the same was pending in the Circuit court on July 31, 1917. In the affidavit of said deputy clerk it is stated: "That the placing of said case upon said calendar No. 5 was the result of a mistake of this affiant, for the reason that he, or the clerks co-

operating with him in the making of said calendars, had not noticed that an appeal had been perfected from a final judgment entered in said cause, because the judgment and appeal aforesaid did not appear on the docket from which said calendar No. 5 was made, but that said judgment and appeal had been posted in a prior docket of disposed of cases; * * and this affiant put it on said calendar under the mistaken belief that the same was a cause pending in said Circuit court on July 31, 1917." The defendant by this appeal seeks to reverse the order of April 13, 1918, reinstating the case.

Section 89 of the Practice Act in part provides:

"The writ of error coram nobis is hereby abolished, and all errors of fact, committed in the proceedings of any court of record, and which, by the common law, could have been corrected by said writ, may be corrected by the court in which the error was committed, upon motion in writing, made at any time within five years after the rendition of final judgment in the case, upon reasonable notice."

By the common law an error of fact committed as a result of a mistake or default of a clerk of the court could be corrected by the writ of error coram nobis. (Brady v. Washington Ins. Co., 82 Ill. App. 380-383.) In 2 Tidd's Practice (4th Am. ed.) at page 1137, it is said: "So, upon a judgment in the King's Bench, if there be error in the process, or through the default of the clerks, it may be reversed in the same court, by writ of error coram nobis." Under the existing statute in this State such an error may now be corrected by the court in which the error was committed upon motion in writing upon reasonable notice. And we think it is clear from the record in this case that the mistake of the clerk of the Circuit court in placing this case upon calendar No. 5, as one of the cases pending on July 31, 1917, in that court, when it was not so pending, is a mistake of fact.

the first of these, the "Journal of the American Medical Association," is a weekly publication of the American Medical Association, which is the largest and most influential of the medical organizations in the United States. It is published in English and is read by physicians and medical students throughout the world. The second of these, the "Medical Record," is a weekly publication of the Medical Record Company, which is a subsidiary of the American Medical Association. It is published in English and is read by physicians and medical students throughout the world. The third of these, the "Medical News," is a weekly publication of the Medical News Company, which is a subsidiary of the American Medical Association. It is published in English and is read by physicians and medical students throughout the world.

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(Brady v. Washington Ins. Co., supra; Silverman v. Childs, 167 Ill. App. 522-524; Domitski v. American Linseed Co., 117 Ill. App. 292; Aaron v. Jefferson Ice Co., 129 Ill. App. 570; Ladden v. City of Chicago, 283 Ill. 165.) In Cramer v. Illinois Commercial Men's Association, 264 Ill. 516-522, it is said: "The error in fact which may be assigned under the motion must be some fact unknown to the court which, if known, would have precluded the rendition of the judgment." And we think it is equally clear that had Judge Zeman known on March 11, 1918, (when the case was called from calendar No. 5, and, no one appearing, was dismissed for want of prosecution) that the case was not properly on said calendar and had been put there through a mistake of the clerk, in disregard of the order of court to place on said calendar only those cases which were pending on July 31, 1917, he would not have dismissed the case. Judge Zeman was misled by the mistake of the clerk. (Brady v. Washington Ins. Co., supra.) He naturally assumed that the case was properly on said calendar. And we do not think that the dismissal of the case by Judge Zeman was the result of any negligence on the part of plaintiff or his attorney.

The order of the Circuit court of April 13, 1918, reinstating the case is affirmed.

AFFIRMED.

DANIEL DAVIS,
Appellee,

vs.

CHICAGO CITY RAILWAY
COMPANY et al.,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

215 L.A. 638

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an action for damages for personal injuries received by plaintiff in a collision between a wagon driven by him and a street car operated by defendants at the intersection of 62nd street and Ashland avenue, Chicago, on July 8, 1915, about 8:30 o'clock in the forenoon. The jury returned a verdict in favor of plaintiff for \$6000. Plaintiff remitted \$1500, and the trial court, after overruling motions for a new trial and in arrest of judgment, entered judgment for \$4500 against the defendants, which judgment defendants by this appeal seek to reverse.

Four points are urged by counsel for defendants for a reversal of the judgment, viz: (1) A recovery is barred by the contributory negligence of plaintiff. (2) The verdict is manifestly against the weight of the evidence. (3) The court erred in giving certain instructions. (4) Both the declaration and the petition to amend the declaration and to substitute the employer of Davis as plaintiff failed to allege that defendants had elected not to accept the Workmen's Compensation Act, and the judgment did not protect defendants against the claims of plaintiff's employer for compensation payable by it to plaintiff.

The accident is of a kind that is somewhat common. Two streets intersect at right angles. Defendants' street cars run over one of them along a double track railway. Plaintiff, driving a team and wagon east on 62nd street, enters the inter-

section and is proceeding across the first of the two tracks when his wagon is struck by a southbound car. At and before the time of the collision there are no obstructions to plaintiff's view to the north - the direction from which the car came. Plaintiff sought to excuse his failure to see the car which struck his wagon by claiming that his attention was taken up by other traffic then about the intersection.

Plaintiff is a colored man and at the time of the accident was about 54 years of age. He had been working for about a year and a half as a teamster for William Krug & Son Co., a corporation. On the day of the accident plaintiff's employer was doing excavating work for a theatre building on the west side of Ashland avenue between 62nd and 63rd streets. Nine or ten teams were working there that morning and the wagons that carried away the dirt were driven west from the excavation into a north and south alley west of and parallel with Ashland avenue; thence north in the alley to 62nd street; thence east on 62nd street and across Ashland avenue. Plaintiff's wagon was an ordinary uncovered dirt wagon holding about 3 cubic yards and drawn by a team of heavy horses.

Plaintiff testified that he never saw the southbound car which struck his wagon, although he had an unobstructed view to the north in Ashland avenue "for a mile or better." He further testified in substance that as he was about to cross defendants' tracks on Ashland avenue there were a considerable number of other wagons moving in various directions, and several street cars, moving both northbound and southbound, which impeded his progress. As to this alleged congestion of traffic at the time at the intersection of the two streets he was not corroborated even by the witnesses introduced on his behalf. And defendants introduced six witnesses to the accident who testified in substance that

there was no congestion there at the time. But even if there was congestion in the traffic to the east and to the south of plaintiff, he should nevertheless have looked toward the north. The evidence clearly shows that, just before the time he drove upon the southbound or west track, had he looked towards the north he would have seen the approaching car. But it is evident that he did not look and that he continued walking his team right into the path of the approaching car, the southwest corner of which came into violent contact with the front part of the wagon, and plaintiff was thrown out upon the street and received the injuries complained of.

We are of the opinion that under the facts disclosed in this record and under the law plaintiff is not entitled to recover any damages for the injuries he has sustained for the reason that he was guilty of contributory negligence, in that he did not look to the north before crossing the track, or, if he did look, that he was bound to see the approaching car and act accordingly. (Chicago, Peoria & St. Louis Ry. Co. v. De Freitas, 109 Ill. App. 104-106; Livingston Warehouse & Van Co. v. Aurora, Elgin & Chicago R. Co., 170 Ill. App. 244-248; Hedmark v. Chicago Rys. Co., 192 Ill. App. 584-588; Schlauder v. Chicago & Southern Traction Co., 253 Ill. 154-159; Cotter v. Chicago City Ry. Co., 141 Ill. App. 101-103; Chicago City Ry. Co. v. Strampel, 110 Ill. App. 482-484; Lee v. Chicago City Ry. Co., 127 Ill. App. 510-513.)

As the judgment must be reversed for the reason indicated, it will not be necessary for us to discuss the other points made by counsel for defendants.

The judgment of the Superior Court is reversed.

REVERSED.

363 - 24715

FINDING OF FACT.

We find as an ultimate fact in this case that the plaintiff, Daniel Davis, in driving the wagon as it approached and got on defendants' railway track, was guilty of negligence which contributed to his injuries, at and before the time of the collision between said wagon and defendants' street car.

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388 - 24741

PERRY J. SMITH,
Appellee,

vs.

JOSEPH BERNHARD,
Appellant.

Appeal from
Superior Court,
Cook County.

215 T.A. 638

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of \$3000 rendered after verdict against Joseph Bernhard, defendant, in an action on the case.

It appears from the evidence, in substance, that on March 16, 1916, plaintiff had been employed for about eight years by the American Express Company, as stockkeeper in its supply department at Chicago, receiving a salary of \$75 per month; that defendant was in the clothing business in Chicago, conducting five retail stores under the trade name of "Bernhard's"; that on March 16, 1916, there was sent from the office of defendant and received by the Express Company, at Chicago, a certain instrument in writing, namely, a statutory notice of the assignment by plaintiff to defendant of any moneys in the hands of the Express Company belonging to plaintiff, as well as any funds due or to become due plaintiff as wages, and notifying the Express Company that defendant held an irrevocable power of attorney by which defendant was appointed the attorney in fact of plaintiff to collect and receive, in plaintiff's name and stead, all moneys due plaintiff for wages or otherwise and to sign receipts therefor, and demanding payment to defendant of all moneys due plaintiff by the Express Company; that at the time of the receipt by the Express Company of said instrument in writing, the Express Company appears to have had in force a custom to the effect that any one

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of its employees, who had executed and delivered any such assignment of wages and power of attorney, should be immediately discharged; that it was not shown that either defendant or any one of his agents had actual knowledge of such custom; that upon the receipt of said paper plaintiff's superior, the superintendent of said supply department of the Express Company, immediately discharged him; that as a matter of fact on March 16th plaintiff was not indebted to defendant in any sum, had not had prior thereto any business dealings with him and had not executed or delivered to him any assignment or power of attorney; that either plaintiff or a representative of the Express Company telephoned defendant's office and talked with one Zenkle, agent of defendant, who said he would look into the matter; that on March 21st Zenkle, having ascertained that a mistake had been made, signed a written withdrawal of such notice of assignment of wages and a release thereof to the Express Company, called at its Chicago office, and delivered said release to the Express Company and had interviews with plaintiff and said superintendent of the Express Company; that plaintiff, however, was not reinstated in his employment by the Express Company; and that plaintiff was out of employment for a period of five months, at the end of which he secured a position in Council Bluffs, Iowa, where at the time of the trial he was working at a salary of \$100 per month. As to what occurred at the interviews at the office of the Express Company on March 21st the testimony is conflicting. Plaintiff testified in substance that Zenkle said he still had an assignment of wages signed by plaintiff which he (Zenkle) would not deliver up until plaintiff paid defendant the amount of the claim. Zenkle, on the contrary, testified in substance that he never said any such thing; that defendant did not have any claim against plaintiff and did not hold any assignment from plaintiff and that he so informed Mr. Ceyton, superintendent of said supply department of the

Express Company. Mr. Ceyton was not a witness.

Plaintiff's declaration consisted of three counts, to which defendant pleaded the general issue. In the first count it is charged that the defendant "wrongfully, wilfully, maliciously, fraudulently, and with wanton disregard of the rights of the plaintiff in the premises, and with intent to extort money from the plaintiff," served said notice of assignment of wages and power of attorney upon the Express Company, as the direct result of which plaintiff was discharged by the Express Company and suffered damage. The third count is similar to the first with the difference that the words "and with intent to extort money" are left out. The second count charges that the defendant "negligently, carelessly, and without due regard for the rights of the plaintiff in the premises," served said notice, etc.

Among the points urged by counsel for defendant as grounds for a reversal of the judgment are, (1) that the court erred in admitting certain testimony; (2) that the attorney for plaintiff in his address to the jury made prejudicial remarks, and (3) that the verdict is so excessive as to indicate that it was the result of passion and prejudice.

We are of the opinion that in two particulars prejudicial error was committed in the court's rulings on the admission of testimony. While plaintiff was on the stand he testified over objection that some time before March 16, 1916, "a person came and saw me; I believe he pulled out a slip of paper; there was a payment due on this suit of clothes; I did not look at the paper; I was informed that I was held responsible for the bill." Defendant's counsel moved that this testimony be stricken out which motion was denied - the court saying "I will strike it all out if it isn't competent." No evidence was subsequently introduced by plaintiff connecting the person who presented said bill to plaintiff with the defendant. This incident of said person presenting a bill to

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plaintiff sometime prior to the date of the service of the notice of assignment on the Express Company was suggested by plaintiff's attorney in his closing argument as being the act of the defendant through an authorized representative. Joseph E. Scanlon, a brother-in-law of plaintiff, testified that after plaintiff's discharge by the Express Company he made efforts to secure other employment in Chicago for plaintiff, that he talked to representatives of four business companies about employing plaintiff, and told them why he was discharged by the Express Company. The witness then testified over objection: "They couldn't take a man that had that kind of a discharge because the company wouldn't stand for it." Defendant's attorney moved that this statement or conclusion of the witness be stricken out, but the motion was denied. We think this conclusion of the witness should have been stricken. It was incompetent and it was prejudicial to the defendant in that it tended to lead the jury to believe that because of defendant's act in serving said notice of assignment plaintiff had been unable to obtain other employment in Chicago, and may have accounted for the size of the verdict, which we think is so excessive, under all the facts disclosed, as to suggest that it was the result of passion and prejudice. Furthermore, we think that plaintiff's attorney in his closing argument made remarks which had a tendency to inflame the minds of the jury. Our conclusion is that there should be another trial. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

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THE COMPLETE ARTIFICIAL STONE
COMPANY, a corporation,
Appellee,

vs.

ANGELINE DYNIEWICZ and CASIMIR
W. DYNIEWICZ,
Appellants.

Appeal from

County Court,
Cook County.

2151.A.638

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On February 25, 1915, the plaintiff commenced an action of the fourth class against the defendants in the Municipal Court of Chicago. In plaintiff's statement of claim it is alleged that its claim is for money due on a promissory note. A copy of the note, dated November 9, 1914, and signed by both defendants, is set forth wherein it appears that the defendants promise to pay to the order of plaintiff, three months after date, the sum of \$700. In plaintiff's affidavit of claim it is alleged that the action is upon contract for the payment of money due upon said note and that the amount due is \$700. On March 19, 1915, defendants filed an affidavit of merits alleging in substance that the consideration for the note had failed. At the same time the defendant, Casimir W. Dyniewicz, filed a petition in proper form for a change of venue, alleging that each and all of the judges of the Municipal Court were prejudiced against him and that the existence of such prejudice first came to his knowledge on March 18, 1915. Endorsed on the petition was the written consent of the defendant, Angeline Dyniewicz, to the filing of said petition and to the entry of the order as prayed for. After a hearing the court denied the petition and a trial was had resulting in a judgment in favor of plaintiff. The defendants sued out a writ of error from this

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Appellate Court and subsequently the judgment of the Municipal Court was reversed and the cause remanded on the ground that the court erred in refusing to grant the petition for a change of venue. (Complete Artificial Stone Co. v. Dyniewicz, 201 Ill. App. 506). Upon the redocketing of the case in the Municipal Court the cause was on November 28, 1916, ordered transferred to the County Court of Cook County. And on January 30, 1917, a transcript of the record and proceedings in the case in said Municipal Court, including the sworn petition and order for a change of venue, together with plaintiff's statement of claim and defendants' affidavit of merits, were filed with the clerk of the County Court.

On March 14, 1918, a hearing was had before said County Court without a jury. Plaintiff offered the note in evidence, to the introduction of which defendants' attorney objected solely on jurisdictional grounds, viz: (1) that plaintiff's statement of claim as filed in the Municipal Court was not sufficient to confer jurisdiction upon the Municipal Court to enter any judgment against defendants and, it conferring no jurisdiction upon that court, could not confer jurisdiction upon the County Court, to which the cause had been transferred by change of venue, and (2) that said statement of claim cannot serve as a basis for the action in the County Court, it not being a common law declaration. The objections were overruled, the note was admitted in evidence and an exception taken. The attorney for defendants thereupon stated that he would stand upon the record as made and that he did not desire to introduce any evidence. There was some discussion as to the amount of interest that should be allowed, which was finally agreed upon as \$70, and the court made a finding in favor of plaintiff

in the sum of \$770, and entered the judgment appealed from.

The same points are here made for a reversal of the judgment, neither of which in our opinion have any merit. Section 40 of the Municipal Court Act provides in part as follows:

"That every case of the fourth class * * * shall be commenced by the filing by the plaintiff with the clerk of a praecipe for a summons, * * * and a statement of the plaintiff's claim, which statement, if the suit be upon a contract, express or implied, shall consist of a statement of the account or of the nature of the demand, * * * but nothing herein contained shall be construed to require the statement of claim in any action for a tort to set forth the cause of action with the particularity required in a declaration at common law. * * *"

Plaintiff's statement in this contract case showed the "nature of the demand" and was clearly sufficient to authorize and support a judgment entered by the Municipal Court. (Schulze v. Gottschalk, 152 Ill. App. 20, 21; Kappes v. Bacon, 209 Ill. App. 290). And the order for a change of venue to the County Court operated to divest that court of further jurisdiction in the case and invested the County Court with jurisdiction to try the case upon the filing with the clerk of the County Court of the transcript and papers above mentioned. (Sections 2, 15 and 16, Chap. 146, Rev. Stat. Ill; Chicago & Alton R. Co. v. Harrington, 90 Ill. App. 638, 640.)

The judgment of the County Court is affirmed.

AFFIRMED.

423 - 24776

NATIONAL SEWING MACHINE
COMPANY, a corporation,

Appellee,

vs.

WALGER AWNING COMPANY,
a corporation,

Appellant.

Appeal from

Municipal Court

of Chicago.

215 I.A. 639

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On October 31, 1917, plaintiff commenced an action of the first class in contract in the Municipal Court of Chicago against defendant, to recover the purchase price of certain goods sold and delivered. The defendant was in the business of manufacturing window awnings, in the construction of which it used certain rods or "studs", and these are the goods in question. Plaintiff's total claim amounted to \$1,045.93. The defense, as disclosed from the affidavit of merits, was that defendant ordered the goods, which were to be like a sample previously furnished by plaintiff; that the goods as delivered were not equal to or the same as the sample; and that they were of no use to defendant in that they were not equal in durability or strength to the sample, contrary to plaintiff's warranty, and "so defendant hereby tenders back said goods." At the beginning of the trial, which was before a jury, the parties agreed that a prima facie case for the plaintiff was made by the pleadings and the court ruled without objection that the defendant proceed with its defense. At the conclusion of defendant's evidence, on motion of plaintiff, the court instructed the jury to find the issues against defendant and to assess plaintiff's damages at the sum of \$1,045.93, the amount of plaintiff's claim, and the court entered judgment upon the verdict for said sum against defendant. This appeal followed.

Two points are here urged by defendant's counsel as grounds for a reversal of the judgment: (1) The court erred in refusing to permit defendant to introduce a certain record of chemical analyses of the sample stud and the studs subsequently furnished. (2) There was sufficient evidence, even without the record of said chemical analyses, to warrant the submission of the case to the jury.

As to the first point, we do not think the court erred in refusing to admit said alleged record in evidence. The witness Hanson, a chemist and employed by Charles C. Kavin & Co., testified in substance that he did not make the analyses himself; that he did not know of his own knowledge the results thereof; that he did not make the original entries of the results; that these were entered by someone else in certain books; that he procured from said books the figures contained in the alleged record sought to be introduced; and that said books had since been destroyed. What is said in Dorrance v. Dearborn Power Co., 233 Ill. 354-360, we think is here applicable: "The record was not admissible under any rule relating to books of account or any statute making a record evidence, and it did not have the sanction of an oath as to its truth." (See, also, Cairns v. Hunt, 78 Ill. App. 420-422.)

And we do not think there is any merit in the second point. The studs in question were delivered by plaintiff from time to time from May 3, 1917, to July 13, 1917. Under directions of defendant they were shipped to a company at Pittsburgh where defendant had them put through a zinc coating process and they were thereafter from time to time received by defendant, and defendant thereafter sued about 20 per cent of the entire lot. The order for the studs was made in writing in February, 1917. Defendant had previously purchased other studs from plaintiff,

and in its said order for the studs in question defendant sent a certain stud as a sample, specified the thickness and the various lengths wanted, and stated that they desired "studs with the shoulder ends but without the groove." Plaintiff manufactured them as ordered, and defendant did not claim that the studs did not conform to defendant's directions as to shape, size or dimensions. The evidence tended to show that complaints from customers of defendant were received that in some instances the "shoulder" of the stud broke off, and that because of this defendant claimed that the steel used in the studs was of a poorer and weaker grade than in the sample submitted, while plaintiff claimed that the trouble was caused by the increased length of the studs as specified by defendant. There was no definite evidence, however, showing that the grade of the steel in the studs was inferior to that of the sample. Furthermore, it appears that, after defendant had received some of the studs and had been advised of some of said complaints, defendant, on July 20, 1917, paid plaintiff the sum of \$500, on account, and continued to use the studs.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

434 - 24787

CHARLES D. GASTFIELD,
Appellee,

vs.

ALEXANDER J. JOHNSON, CHARLES
E. FRAZIER and JOSEPH P. GEARY,
Civil Service Commissioners of
the City of Chicago,
Appellants.

Appeal from

Superior Court,

Cook County.

215 I.A. 639

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On May 24, 1917, in the Superior Court of Cook County appellee filed his verified petition for a writ of mandamus against appellants. In his petition he alleged, in substance, that on July 20, 1912, he was duly appointed to the place or position of employment of principal examiner of the Civil Service Commission of the City of Chicago; that said City of Chicago at a general city election, held on April 2, 1895, duly adopted the Civil Service Act, approved and in force March 20, 1895; that said position of employment is a part of the classified service of said city, as defined and regulated by said act and by certain rules adopted by said commission under the provisions thereof, and is classified and graded as class C, grade V; that petitioner's appointment to said position was made under and pursuant to an examination and certification duly conducted; that in June, 1912, a public competitive examination of applicants for said position was duly held by said commission, at which petitioner passed and became the candidate standing highest upon the register for said class or grade, and on July 18, 1912, said commission duly certified his name to the appointing officer and he was duly appointed; that he held said position and performed the duties thereof, and received the salary therefor,

from July 20, 1912, until December 29, 1916, when he was wrongfully discharged by appellants by a certain notification in writing, dated December 29, 1916, and delivered to him, wherein it was stated that "the commission regrets to advise you that owing to reduced appropriations for the year 1917, necessitated by the city's straitened financial condition * * your employment cannot be continued after December 31, 1916"; that from and after said last mentioned date appellants have prevented him from performing the duties of his said position or any duties in the classified service, although he was then and there able, ready and willing and offered so to do; that the statement in said notification of December 29, 1916, was unwarranted and erroneous, in that the city council of said city did not adopt its annual appropriation bill for the year 1917, until January 31, 1917, when it did appropriate the sum of \$60,590 for said civil service commission; that at the time of his said discharge one of the rules of the commission then in force provided that whenever it became necessary in any bureau, through lack of funds or other cause, to reduce the force in any employment, the person working in said bureau who was last certified for such employment should be the first laid off, and that seniority of certification should control in lay-off in cases of employees transferred from one bureau to another or re-instated in the service; that petitioner had and has seniority of certification for appointment to said position of principal examiner and to said class C, grade V; that appellants have appointed and permitted divers other persons to do the work and receive the salary rightfully belonging to petitioner; that said persons have been wrongfully appointed under pretended exercise of authority known as temporary authority, and are paid in part out of funds appropriated for special examiners, and are doing work rightfully belonging to

petitioner, and receiving pay therefor, contrary to the provisions of the civil service act; that petitioner was wrongfully removed from his said position of employment, without cause and without any written charges against him having been made and without his having had any opportunity to be heard in his own defense; and that appellants had no right to remove him from said position and that he is wrongfully kept out of the same.

The prayer of the petition was that appellants be commanded "forthwith to reinstate your petitioner to and in said position of employment of principal examiner for the Civil Service Commission of the City of Chicago, and to certify to the proper authorities his name for payment of the salary of such position from December 31, 1916, and to restore his name to the register of the classified service of the City of Chicago as principal examiner "1 in class C, grade V, and that such further order may be made in the premises as justice may require."

To the petition appellants filed a general and special demurrer, supported by the affidavit of counsel that the same was well founded in law and not interposed for delay. As special cause for demurrer it is stated (1) that "the petition is defective in seeking two kinds of relief, one of which - the reinstatement of petitioner - must precede the other, - the collection of back salary by an appropriate action brought for that purpose," and (2) that "the petition is defective in embracing two separate causes of action."

On June 8, 1918, the court overruled the demurrer and appellants were ruled to plead in five days. On June 12, 1918, appellants moved to be allowed to stand by their demurrer, which motion the court granted and adjudged that a peremptory writ of mandamus issue commanding appellants to forthwith restore

petitioner to the position of principal examiner of the Civil Service Commission of the city of Chicago with the same right to perform and continue in the performance of his duties of principal examiner as he had prior to his removal and to "certify his name to the proper authorities for the payment of his salary from month to month from the date of his restoration to said position." It is to reverse said judgment that this appeal was perfected.

In City of Chicago v. People ex rel. Gray, 210 Ill. 84, Gray, a police patrolman, on May 19, 1902, filed a petition for mandamus against the city and others to compel the city and its chief of police to place his name upon the roster of police patrolman and upon the police payroll; also to compel the civil service commissioners of said city to certify his name to the comptroller as a person entitled to such pay, and to compel said comptroller to pay his salary of \$83.33 per month (less one per cent for the police pension fund) "from January 31, 1900 to April 30, 1902, making the sum of \$2227.50", and to pay him his salary thenceforth as it accrued. The writ was awarded substantially as prayed and the appellate court affirmed the judgment. The Supreme Court, however, reversed both the judgments of the superior court of Cook County and the appellate court and remanded the cause with directions to dismiss the petition in so far as it sought a writ of mandamus to compel the payment of Gray's salary, or any part thereof, and with directions to enter a judgment awarding a writ of mandamus to place Gray's name upon the roster of police patrolmen and upon the police payroll, with the same right to continue in the performance of his duties as a police patrolman and to receive salary therefor as he had prior to his unlawful removal, subject to the laws, rules and ordinances pertaining to police patrolmen. The Supreme Court says on page 89:

"The petition was obnoxious to a demurrer. It sought two kinds of relief, one of which must be obtained before there could be a clear legal right to the other. Relator stood discharged from the police force of the city of Chicago. Until he was reinstated and his name restored to the roll he was not, under any circumstances, entitled to maintain mandamus requiring the city or its officers to pay him. If the facts averred in the petition are true, relator was entitled to be reinstated, and the question of his right to the salary could then be litigated; but it is manifest that a re-instatement must precede any attempt to collect the salary by mandamus."

In People ex rel. Jacobs v. Coffin, 282 Ill. 599-610, it is said (italics ours):

"Appellants rely on the case of City of Chicago v. People, 210 Ill. 84, as sustaining their contention that the petition is obnoxious to a demurrer in seeking two kinds of relief: reinstatement of petitioner and the collection of his salary. The demurrer in this case is a general demurrer and does not specially challenge the petition on that ground. In the absence of a special demurrer, where the petition is otherwise sufficient, this court will not deny the writ of mandamus simply because the petition asks the court to compel the performance of two different acts. In such case it may be issued for a part of the relief sought and denied as to a part, or the whole of the relief may be granted in the absence of a specific objection or defense that only a part of the relief should be granted."

In the present case the petition prayed for "two kinds of relief" - viz: that the civil service commissioners (appellants) be commanded to forthwith re-instate petitioner to said position of principal examiner, and to "certify to the proper authorities his name for the payment of the salary of such position from December 31, 1916." And to this petition appellants filed a special demurrer in which they specially challenged the petition on the ground that it sought two kinds of relief - one, petitioner's re-instatement in his said position, and the other, the collection of his back salary.

While we are of the opinion, under the authority of Coffin case, supra, that, if the facts averred in the petition were true, petitioner would be entitled to a writ of mandamus re-instating him in his said position, still, by reason of the

decisions of our Supreme Court, in the Gray and Coffin cases, above quoted from, we are constrained to hold that the trial court, in the present case, erred in overruling appellants special demurrer to the petition and, after they had stood by their demurrer, in entering the judgment appealed from. Appellants should not have been required to answer a petition obnoxious to a special demurrer, and it was their privilege to file an answer to a good petition if they so desired.

For the reasons indicated the judgment of the Superior Court is reversed and the cause remanded with directions to the Superior Court to sustain the special demurrer to said petition, giving appellee a proper time within which to amend the same.

REVERSED AND REMANDED WITH DIRECTIONS.

443 - 24796

IN THE MATTER OF THE ESTATE
OF ERASTUS A. BARNES, deceased,

MARIA P. BARNES, Claimant,
Appellee,

vs.

MARY C. BARNES, Administratrix,
Appellant.

Appeal from

Circuit Court,

Cook County.

215 I.A. 639

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit Court of Cook County for \$1445.02 entered April 30, 1918, in favor of said claimant and against Mary C. Barnes, administratrix, of the estate of Erastus A. Barnes, deceased, "to be paid in due course of administration."

From the transcript of the record before us the following facts appear: On March 24, 1917, the attorney for said claimant served a notice upon the attorneys for said administratrix, notifying them that on March 26th he would appear in the Probate Court of Cook County and present a "bill of costs", in the case of Maria P. Barnes, appellant v. Mary C. Barnes, administratrix etc., appellee, General No. 21926, in the Appellate Court of Illinois for the first district, and move the court "to allow said judgment as a claim against said estate and for a rule upon the administratrix to pay the same immediately." On April 7, 1917, a hearing on the motion was had in the Probate Court at which time said claimant presented and filed a paper headed "Bill of Costs" and entitled in said cause General No. 21926; then followed the statement "December 19, 1916, Reversed and Remanded with directions, costs to be paid one-half by appellant and one-half by appellee"; then followed an itemized bill of the costs showing one-half

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thereof to be \$1445.02; then followed the certificate of the clerk of the Appellate Court, under his hand and the seal of the court, in which he certified that the above and foregoing was a true and correct "statement of costs" in said cause as appeared from his file book. At the conclusion of the hearing the Probate Court adjudged that said Mary C. Barnes, administratrix, etc., pay to said claimant within 20 days the sum of \$1445.02, and that said sum when paid should be a proper credit of said administratrix against the funds of the estate with which she is chargeable. From this judgment of the Probate Court said administratrix prayed and perfected an appeal to the Circuit Court of Cook County, in which latter court the said claimant subsequently entered an appearance by her attorney. On April 30, 1918, a trial de novo was had in the Circuit Court, at which both parties were present by their attorneys. The claimant introduced in evidence over objection the same "bill of costs", certified by the clerk of the Appellate Court in the words and manner aforesaid, and also offered in evidence over objection copies of two written opinions of this Appellate Court, filed respectively on December 19, 1916, and February 20, 1917, and then the claimant rested. Both copies of the opinion were entitled "Maria F. Barnes, appellant, v. Mary C. Barnes et al., appellees" and were certified by the clerk, under his hand and seal of the court, to be "a true copy of the opinion of said Appellate Court in said cause, as appears of record in my office." In the latter copy it appears to be stated therein: "Inasmuch as the hearing proceeded before the chancellor by stipulation of the parties, the costs of this appeal will be taxed, one-half to the complainant and one half to the defendant, as administratrix, etc., the latter to be paid in due course of administration. The decree of the Circuit court will be reversed and the cause remanded for further proceedings

not inconsistent with the views hereinabove expressed. Reversed and remanded with directions." The defendant, administratrix, etc., moved to strike out all of the claimant's evidence and for judgment for defendant, which motion was denied, and thereupon defendant introduced certain documentary evidence and the testimony of one witness, all of which, in the view we take of the case, it will be unnecessary to consider. Thereupon the court found the issues in favor of the claimant and assessed her damages at \$1445.02 and entered the judgment appealed from.

Section 65 of the Administration Act provides in part as follows: "A judgment regularly obtained, or a copy thereof duly certified and filed with the court, shall be taken as duly proven." In Darling v. McDonald, 101 Ill. 370, it is decided in substance that a judgment of the Circuit court against an executor or administrator, to be paid in due course of administration, binds the assets in the hands of the executor or administrator; that such a judgment sustains the same relation to the assets of the estate as a judgment in the county or probate court and is not subject to revision by the county or probate court; that the claims required to be presented by section 60 of the Administration Act at the term fixed upon for the adjustment of claims against the estate, are those which have not been liquidated or established, and upon which it is necessary to hear evidence, and not those that have been reduced to judgment binding upon the executor or administrator; that a judgment regularly obtained against the personal representative of a deceased person is duly proven to the county or probate court, under section 65 of said Act, by "a copy thereof duly certified and filed with the court"; and that said section 65 "is simply confined to declaring a rule

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of evidence in regard to judgments already obtained against estates." (See, also, Bradwell v. Wilson, 168 Ill. 346-352). In Marzfeld v. Converse, 105 Ill. 534-537, it is said: "According to the decision of this court in Coalfield Coal Co. v. Peck, 96 Ill. 139, the opinion of the Appellate Court may not be looked into to ascertain what that court decided." It is the judgment of the Appellate Court entered of record, as distinguished from its opinion, that governs. (Strodtmann v. County of Menard, 158 Ill. 155-158; Pennsylvania Co. v. Versten, 140 Ill. 637-640; Voight v. Anglo-American Co., 202 Ill. 462-465; McEville Mfg. Co. v. Casady, 275 Ill. 462-476; Fisher v. Burks, 285 Ill. 290-293.)

In the present case the so-called "bill of costs" introduced in evidence by the claimant, was certified by the clerk of the Appellate court as being a true and correct "statement of costs". No copy of any judgment of the Appellate Court "duly certified and filed" was introduced in evidence. Only copies of certain opinions of the Appellate Court, certified by the clerk as being true copies, were introduced. The rule of evidence in regard to proof of "judgments already obtained against estates", as declared by section 65 of the Administration Act, was not complied with. We are, therefore, constrained to hold that the evidence was not sufficient to sustain the finding and judgment of the Circuit Court, and the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

472 - 24825

JOHN E. TRAEGER, for use of
Anton J. Cermak, bailiff,
and Abraham Keeshin,
Appellees,

vs.

Appeal from
Municipal Court
of Chicago.

OSCAR HENDRY and CAROLINE SNIDEL,
Appellants.

215 I.A. 639

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Plaintiff commenced an action of the first class in contract in the Municipal Court of Chicago against the defendants upon a replevin bond executed by them. They filed an affidavit of merits but did not demand a jury trial. On May 22, 1918, about noon, the case was called for trial, at which time a clerk of the attorney for defendants stated that said attorney was then engaged in the trial of another case and moved for a continuance. No affidavit of any kind was presented. The court denied the motion, heard the evidence of the plaintiff and entered a finding and judgment against the defendants in the sum of \$700. On June 1, 1918, the motion of defendants to vacate the judgment was heard and denied. This motion was accompanied by the affidavits of the attorney of the defendants and of said clerk. By this appeal the defendants seek to reverse the judgment.

The sole grounds for reversal of the judgment, as disclosed from the brief of counsel for defendants filed in this court, are (1) that the trial court, in refusing a continuance of the case, violated a certain rule of the Municipal Court, and (2) that the court erred in refusing to vacate the judgment upon the affidavits presented.

The rules of the Municipal Court are not contained in the record before us and we cannot take judicial notice of them. (Sixby v. Chicago City Ry. Co., 260 Ill. 478; Scoville Mfg. Co. v. Cassidy, 275 Ill. 462-476.) And in our opinion the court properly refused to vacate the judgment upon the affidavits presented, for the reason that in neither of them were any facts stated showing that defendants had a meritorious defense to plaintiff's action. (Culver v. Brinkerhoff, 180 Ill. 548-553.) Finding no error in the record, the judgment is affirmed.

AFFIRMED.

141 - 24448

THE PLYMPTON PRESS,
a corporation,

Defendant in Error.

vs.

ARCHARGE PEACOCK HOLDSWORTH, and
FRED JAMES HOLDSWORTH,

Plaintiffs in Error.

WARRANT TO

CIRCUIT COURT,
COCK COUNTY.

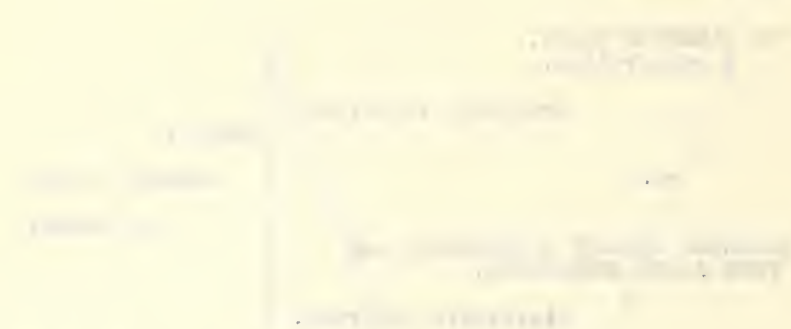
215 I.A. 640

MR. PRESIDING JUSTICE THOMSON delivered the
opinion of the court.

This writ of error was sued out by the defendants,
the Holdsworths, to reverse a judgment secured by the plain-
tiff, The Plympton Press, in the sum of \$3,006.55, being
the principal and interest due on a promissory note on which
they were endorsers.

The plaintiff was a creditor of the Browne & Howell
Co., the former being located in an eastern city and the
latter in Chicago. The account being unsatisfactory to the
plaintiff, one Orcutt, was sent to Chicago to see the debtor.
It appears that he conferred with one Browne, an official of
the debtor company. He examined the debtor's books and found
that it was insolvent and threatened bankruptcy proceedings
unless given the debtor's note for the balance then due, with
a satisfactory endorsement. Browne finally gave Orcutt the
note here sued upon which was endorsed by himself as well
as the defendants who were relatives of his. The note not
being paid at maturity, this suit was instituted.

In urging that the judgment be reversed, the defend-
ants first say that error was committed when the case was set



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for trial, as they contend, out of its regular order. The case was No. 457 on the calendar of Judge Crowe. On December 10, 1917, before the case had been reached on the first or preliminary call, the executive committee of the Circuit Court of Cook County entered an order transferring the case to Judge Heard and setting it for hearing on December 17. It appears that this was done because one of the counsel representing the plaintiff then anticipated entering the military service of the country at an early date. This action of the executive committee of the Circuit Court was entirely proper and in no way in violation of any of the provisions of the Practice Act. Furthermore the record disclosed no objection by defendants to the orders of December 10, transferring the case to Judge Heard and setting it for hearing on December 17.

When the cause was reached for trial on December 17, defendants moved for a continuance of three days so that one of their counsel who was absent and attending the sessions of Congress as a member of the House of Representatives might return and conduct their defense. The son of the absent counsel was in court. He had been in court representing defendants, on December 10 when the order was entered transferring the case, and at that time he presented arguments in opposition to plaintiff's motion to strike the affidavit of defense from the files. The son was one of the counsel of record for the defendants. The court overruled the motion for a continuance and this is assigned as error. The question of allowing a continuance was within the court's discretion and we believe in denying this motion the court made no abuse of its discretion. Even if we felt otherwise, we would not be justified in reversing the judgment for that reason because the record

shows that defendants suffered no harm by reason of the action of the court in denying their motion for a continuance.

Finally defendants urge that the judgment against them should be reversed because it was a breach of good faith on the plaintiff's part when Orcutt failed to inform them of the insolvent condition of the Browne & Howell Co., and of the plaintiff's purpose to put that concern into bankruptcy unless they received a note for the amount due them, with a good endorsement. Browne testified that he told Orcutt he had told the defendants that his company was solvent and thereby he had secured their endorsement on the note in question. Orcutt denied that Browne made any such statement to him. This contradictory testimony was for the jury to pass upon. Furthermore no fiduciary relation existed between the plaintiff or Orcutt, and the defendants. Orcutt owed them no duty save not to misrepresent the facts, if they enquired of him as to what they were. Haw v. Greve, 34 Ind. 18; Hagee v. Manhattan Life Ins. Co., 2 Otto. 93. It is not claimed that they did so. If the jury believed Orcutt's testimony, and the record discloses no reason why they might not properly have done so, he had the right to presume that they were aware of the financial status of the debtor. Their endorsement of the note was in no way inconsistent with such knowledge, for they might have been willing to endorse the note by reason of other considerations and the notwithstanding/bad financial condition of the principal debtor.

We have given careful consideration to all the points urged by defendants for reversal of the judgment recovered by plaintiff although some of them are not proper-

ly before us, for in the abstract filed by them, the testimony submitted to the jury has not been abstracted.

Finding no error in the record, the judgment of the Circuit Court is affirmed.

AFFIRMED.

169 - 24516

EDWARD T. PAGE,

Appellant,

vs.

FRANK GILLMAN,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

215 I.A. 640

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Page, brought this action in the Municipal Court of Chicago to recover a balance of \$100.00, which he alleged was due from the defendant on an instrument described in the statement of claim as a promissory note. The issues were tried by the court without a jury, resulting in a finding for the defendant, pursuant to which judgment was duly entered, to reverse which the plaintiff has perfected this appeal.

In support of his case the plaintiff called the defendant as a witness under sec. 33 of the Municipal Court Act. He admitted his signature to the document in question and further that he had never paid anything on account of it. The document was then offered and received in evidence and the plaintiff rested.

The document in question, described in the statement of claim as a promissory note, read in part as follows: "I hereby subscribe for and acknowledge the receipt of a scholarship in the Page-Davis School involving a correspondence course in advertising and

RECEIVED

JAN 10 1964

BY

FEDERAL BUREAU OF INVESTIGATION

WASHINGTON, D. C.

81-11-010

MR. ROBERT L. BROWN, JR., 1000 15th Street, N.W., Washington, D. C.

RE: MURDER OF MARTIN LUTHER KING, JR.

The following information was received from the Washington Field Office on January 9, 1964, at 10:00 a.m. It was obtained from a confidential source who has provided reliable information in the past. The source stated that he had been contacted by an individual who offered him \$5,000 to travel to New Orleans, Louisiana, and to remain in the city for a period of ten days. The source stated that he had declined the offer and that he had no further information regarding the matter.

In view of the fact that the source has provided reliable information in the past, it is recommended that the information be included in the report. It is suggested that the information be included in the report as a separate paragraph. It is suggested that the information be included in the report as a separate paragraph.

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I promise to pay to Edward T. Page or his order the sum of \$110.00 in the manner following: \$5 on the 4th day of March 1914 and \$5 on the 4th day of April and \$5 on the 4th day of each month thereafter until the amount of \$110 is fully paid." Following this the signer of the instrument (the defendant) agrees to devote certain time to studying the course and there are certain elements of agreement set forth between the parties. Below, there is a paragraph beginning "In consideration of the foregoing it is agreed as follows;" and here appear seven paragraphs setting forth the terms of the agreement thereby entered into. The instrument is signed by the defendant only. At the head of it we find these words, "Do not sign this subscription without reading it."

While this document may be said to contain the elements of a promissory note it is by no means a negotiable instrument. Wherever a promissory note includes the terms of the contract on which it is based in such a way as to make the note subject to the terms of that contract, the negotiability of the paper is destroyed. Klots Throwing Co. v. Manufacturers' Commercial Co., 179 Fed. 813. Northwestern Natl. Ins. Co. v. Southern States Phosphate and Fertilizer Co., 93 S. E. (Ga) 157; National Bank of Newbury v. Wentworth, 218 Mass. 30; Greenbrier Valley Bank v. Bair, 71 W. Va. 684; 30 L.R.A. New series, 40 Note; L.R.A. 1918, B 639 Note. Furthermore it is provided by the Negotiable Instruments Act, Ill. Rev. Stat. ch. 98, sec. 5 that, "an instrument which contains an order or promise to do an act in addition to the payment of money is not negotiable under this act." This section contains certain exceptions to that proposition which are not applicable here.

The plaintiff has called our attention to a number of cases holding that the negotiability of a note is not affected by a reference in it to the method of payment or the fund from which the payment is to be made, or some other instrument or contract representing the consideration for the note, but we do not deem these cases in point. The instrument in question in this case, although containing, as we have stated, the elements of a promissory note, contains also the agreement by the signer of the instrument to do certain things in addition to the payment of money and incorporates in the instrument itself the terms of the contract by the parties, and in such a way as to make the note or the promise to pay, subject to its terms.

We hold, therefore, that the instrument in question was not a negotiable note. It was so held by this court in Page v. Wooster, case No. 24178, opinion filed Feb. 11, 1919, (Not yet reported) which was a suit by the same plaintiff on the same sort of an instrument, and again by this court in Midwest Collection Bu. v. Greenwald, case No. 24958, opinion filed June 16, 1919 (Not yet reported), another suit brought on one of these alleged negotiable notes, by a corporation which sought to recover as an indorsee. There is nothing to the contrary in the decision of this court in the case of Page v. Suender, 210 Ill. App. 208, for in that case the plaintiff put in such proof as was sufficient to make out a prima facie case in an action on special contract. In the case at bar, however, he did not do so, merely making such a prima facie case as might have been sufficient if his suit had been upon a negotiable instrument. As it is not a negotiable instrument, for the

The first thing I noticed when I stepped
out of the car was the smell of the
city. It was a mix of old and new, of
history and modernity. The air was thick
with the scent of the past, but also
with the promise of the future. I had
heard that the city was a place of
contrasts, and now I knew it was true.
The old buildings stood tall and proud,
their walls telling stories of centuries past.
But alongside them, modern skyscrapers
reached for the sky, their glass facades
reflecting the sun. It was a beautiful
sight, a testament to the city's rich
history and its vibrant present. I had
come to the right place, and I was
about to discover the secrets of this
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reasons we have stated, the case made out by the plaintiff was insufficient and the trial court did not err in finding for the defendant, although the latter took the stand in his own behalf and testified that after he received his first lesson he was so disgusted that he did not answer it, nor the second lesson, which he also received.

For the reasons stated the judgment of the Municipal Court is affirmed.

AFFIRMED.

188 - 24535

^M
FRANK J. ROEHAN,

Appellee,

vs.

MOIR HOTEL COMPANY,
a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

215 I.A. 640

MR. PRESIDING JUSTICE THOMSON delivered
the opinion of the court.

This is an appeal by the defendant Moir Hotel
Company from a judgment recovered in the Municipal Court
of Chicago for the sum of \$500.

The testimony in the record is in direct conflict. The plaintiff testified that he was a guest at the Morrison Hotel, owned and operated by the defendant, when he met a stranger who made himself very agreeable and within a day or two after the meeting requested the plaintiff to cash a certified check for \$500. The check was signed by one Meyers and was drawn to the order of one Rosenberg and endorsed by the latter. The plaintiff declined to cash it, whereupon Rosenberg (the stranger) asked him to have the defendant cash it. Rosenberg was not a guest of the Hotel. The plaintiff testified that he then went to the Manager of the Hotel, taking Rosenberg with him; that he told the manager that Rosenberg had requested him to ask the Hotel to cash the check; that the manager took the check from Rosenberg and then

Page 2 of 2

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said that he did not have enough cash in his office to comply with the request; that he handed it back to Rosenberg and referred them to Mr. Rice, the treasurer of the Hotel Company; that they both then proceeded to the office of Mr. Rice, to whom the plaintiff repeated the statement he had made to the Manager; that Rice called somebody on the telephone and then asked Rosenberg to endorse the check, which he did, whereupon Rice cashed it and handed the money to Rosenberg.

Within a day or two after this occurrence the plaintiff, whose home is in Boston, left Chicago for the east and upon returning a few days later and again becoming a guest at the Morrison Hotel was told by the Manager that the check had come back and that it had turned out to be a forgery. The plaintiff testified that during this visit to Chicago he left \$6300 in cash with the hotel clerk for safe keeping and that when he asked for the return of this money a day or two later the defendant refused to return it to him until the check matter had been settled. The plaintiff said that he was anxious to secure his money and get back to Boston so he told the defendant to take out the \$500 "until I get time to settle it with the Hotel people or in court" and return the rest of his money. Thereupon the clerk took out \$500 and returned the balance of the money to the plaintiff together with a receipt which he signed without reading it. This receipt read "Received of F. J. Meehan, Five-hundred Dollars in payment of check". The plaintiff seeks to recover the \$500 thus retained by the defendant.

The testimony of the defendant's witnesses, who were the manager of the Hotel, Mr. Rice the treasurer of the company and a young woman clerk, contradicts that of the plaintiff in most respects but on one or two points it corroborates it. The manager says that when the plaintiff came to him about this check he was alone. Mr. Rice testified that the plaintiff and another man came into his office and that the plaintiff presented the check; that he telephoned the manager to be sure he had sent the plaintiff to him; that he ascertained that the plaintiff was a guest at the Hotel and got his room number and wrote it on the back of the check and upon cashing the check he handed the money to the plaintiff; that the check was endorsed when the men came in and no endorsement was made in his office; that when he gave the plaintiff the receipt and the balance of the money he had left with him for safe-keeping, the plaintiff took the receipt and read it. The young woman testified that on the occasion of the cashing of the check, plaintiff was the one who handed the check to Rice and Rice handed the money to the plaintiff, and that when the plaintiff returned some days later and Rice told him the check was no good and that he would have to retain \$500, the plaintiff made no objection.

The trial was had before the court without a jury. The problem presented to the court was one largely of credibility,- he saw the witnesses and heard them testify and in our opinion the evidence is not such as would justify this court in reversing the judgment of the trial court on the question of the weight of evidence. The story told by the plaintiff has considerable corroboration in the fact that the check does not bear his endorsement but only that

of Rosenberg, the payee, especially in the light of the admission of one of the witnesses, that it was the custom of the Hotel to require guests to endorse any checks that were cashed for them. We cannot say that the trial judge was not warranted in concluding that the defendant did not cash this check for the plaintiff but for Rosenberg.

It is further urged by the defendant that the trial court erred in refusing certain propositions of law that were submitted by the defendant. Of the six propositions of law so submitted, the court refused five and held one. Although some of the propositions refused were correct statements of the law applicable to the defendant's theory of the case, we do not deem their refusal reversible error because they may be considered as included in the proposition which the court held although their subject-matter was slightly different.

The purpose subserved by propositions of law is to determine whether the trial judge entertains correct views of the principles of law involved in the proceeding. The court held the fourth proposition of law submitted by the defendant, which declared the law to be that if the plaintiff had possession of what purported to be a genuine check and requested the defendant to cash it and the defendant did cash it and the check turned out to be a forgery, the plaintiff could not recover although he may have believed the check to be genuine and in requesting the defendant to cash it had acted in good faith. The court having held that proposition of law, we are unable to say that the judgment entered was due to the fact that

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the court entertained an incorrect view of the law applicable to the case, but we feel obliged to conclude the court entered the judgment for the plaintiff because the court concluded from the evidence submitted that the facts were as testified to by the plaintiff and not in accordance with the contention of the defendant.

Finding no error in the record the judgment of the Municipal Court is affirmed.

AFFIRMED.

197 - 24545

JAMES J. REILLY, Administrator
of the Estate of Michael J.
Missey, deceased,

Defendant in Error.

vs.

R. WILSON MORE,

Plaintiff in Error.

WRIT TO

CIRCUIT COURT,

COOK COUNTY.

2151A. 640

MR. PRESIDING JUSTICE THOMSON delivered the
opinion of the court.

This suit was brought by the plaintiff to recover damages sustained by the next of kin of the deceased, by reason of the wrongful death of the latter, alleged to have been caused by the negligence of one in the service of the defendant.

The jury found the issues for the plaintiff and assessed his damages at the sum of \$7,000.00. By this writ of error the defendant seeks to reverse the judgment for that amount.

Originally there were two other defendants, but on a former trial the jury was instructed to find them not guilty. In that trial the jury found the issues against the defendant More. That verdict was set aside and a new trial granted.

It is admitted that the death of the deceased was caused by the gross negligence of a colored chauffeur in driving an automobile along the street at reckless speed,

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but the defendant contends that he is not liable therefor because he was neither the owner of the automobile nor was the chauffeur his servant. That was the issue presented to the jury. In our opinion their verdict is clearly against the manifest weight of the evidence.

The defendant More is a lawyer with offices in the Title & Trust Building in the City of Chicago. There were other lawyers occupying the suite in which More's office was located,- among them Frank L. Childs and George H. Mason. One C. E. Smith had desk room in the reception room. One John Cuthbertson was a clerk in the employ of George H. Mason.

The colored chauffeur was known as Kibbey. He was the only witness for the plaintiff, on the real issue in the case to which we have referred. Among other things he testified that the automobile he was driving when the deceased was knocked down and killed, "belongs to Mr. More;" that on Saturday June 8, 1912 he drove the car from the Apollo Garage to the Title & Trust Building and went up to More's office where he saw More who said, "I want you to take my car and show these men around the city and John will go with you and tell you where to go." At this time Kibbey was employed at the Lincoln Park Garage about three blocks from the Apollo Garage. Kibbey testified that he did not see Smith at the office in the Title & Trust Building when he went there with the car; that John and the men referred to got in the car and he drove them through the parks on the south side of Chicago and in the evening to Riverview Park and later to the Plaza Hotel where he left them; that he picked up Smith at the Plaza Hotel and went

and got some lady who was a friend of Smith's and took her home. He testified further that on the following morning, Sunday, he had an engagement with Smith at nine o'clock to get a tire; that after they got the tire he left Smith and picked up John and the other men,- he thought at the Title & Trust Building and drove to Austin. He further testified that the men he was driving about were "three Swedish gentlemen"; that on their return from Austin, they went to the Title & Trust Building and while his passengers went to dinner, he returned to the garage for gasoline and was told to come back at two o'clock. On the way back Kibbey ran into the deceased and killed him. On cross examination Kibbey testified that he had seen the automobile in question in the Lincoln Park Garage where he was employed, within two weeks before the accident; that about three days before the accident More came and took this car and three others away; that he did not hear More give any instructions about taking this car away,- he did not see any bill of sale and did not see More pay any money; that he never saw More drive the car; that Smith was the man who bought the tire on Sunday morning; that it was between one-thirty and two o'clock when he reached More's office on Saturday,- that when he reached More's office he saw More but did not remember seeing the three men in the office; "I walked right into Mr. More's office and got my orders and walked out. I don't remember whether I saw these three men there;" that the first time he saw the three men was when they stepped into the automobile in front of More's office; that John was then with them but Smith was not in the automobile when it left More's office; that he did not see Smith until Saturday night at the Plaza Hotel and he

did not see him at More's office; that he knows Frank Childs and first saw him at the coroner's inquest; that he did not remember seeing him or speaking to him at More's office that Saturday afternoon; that on Sunday morning he met Smith at the Plaza Hotel and took him down town where Smith gave him the check to pay for the tire which he had procured before he got Smith and that he took the check up to the garage when he went to lunch; that he could not run the car over 35 miles an hour and that at the time he struck the deceased he was going 12 or 15 miles; that no one was in More's office when he had his talk with him; that immediately after he had this talk he went down to the car and waited; that Smith was not present when he turned the check over for the tire and that Smith did not direct that part of the proceeds of the check be turned over to him; that he got no money for driving except a few tips. He further testified that he was to get 60 cents an hour and all he got was \$5.00 which More paid him about a week after the accident while he was in the County Jail; that Smith did not go to the garage with him when he got the tire and was not there when he paid for it; that More was not in the car on either Saturday or Sunday and that he did not see More speak to any of the three men on either of those days; that he did not see the three men in More's office on Saturday; that he did not know who More was referring to when he said, "I want you to drive these men around town;" that he did not see More speak to John; that More paid his (Kibbey's) wife all he was to get for driving the car except the \$5.00 referred to; that his wife is dead.

The first of these is the fact that the
 government of England has been so long in
 the habit of interfering with the
 commerce of other nations, that it is
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 which does not feel the influence of
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 English policy.

Neither Smith or John were produced as witnesses. It was shown that Smith had died during the year following the occurrence in question and John was in the service in France.

Outside of a few uncontroverted matters, practically every material part of Kibbey's testimony was flatly contradicted by the various witnesses who testified for the defendant. Other witnesses for the plaintiff contradicted him in testifying that when Kibbey struck the deceased he was driving from thirty to fifty miles an hour. It appears from the testimony submitted in behalf of the defendant that the guests being entertained on the Saturday and Sunday in question numbered four and not three as Kibbey testified. They were from Janesville, Wisconsin. Three of them appeared and testified for the defendant. One of them, Berg, testified that he was a stockholder in the United States Operating Company; that he met Smith in the Spring of 1912 and "We bought stock in the United States Operating Company from him." He testified that he and his friends reached Chicago Saturday morning about nine o'clock and went to the offices of the Operating Company in the McCormick Building where they met Smith and several others. After 15 or 30 minutes they went out to Sears, Roebuck & Co. returning to the McCormick Building about noon, at which time "Smith was there"; that they then remained at the office of the Operating Company half or three-quarters of an hour when they took the automobile trip through the parks; that Smith and the four men from Janesville went on this trip; that he first saw Kibbey when they entered the automobile in front of the

McCormick Building; that after returning from the ride through the parks they went to the Plaza Hotel where Smith got out and John got in the automobile; that they then went to Riverview Park returning to the Plaza late in the evening where they again met Smith; that he and his friends stopped at the Plaza Hotel as the guests of Smith. He then testified about the drive to Austin on the following morning; that "up to this time I had never seen or heard of H. Wilson More"; that he and his friends had come to Chicago for a good time as the guests of Smith, on his invitation, extended when he was in Janesville sometime during the preceding spring; that Smith introduced him and his friends to John when the latter got in the automobile at the Plaza; that Smith then gave John some money telling him to see that they had a good time; that he and his friends and Smith got into the automobile at the McCormick Building between 12:30 and 1 o'clock. Testimony to the same effect was given by the other two Janesville men who testified. One Tobiaszon testified that he was doing some carpenter work for More at his premises 2843 Park avenue (several miles from More's office) and that More paid him at these premises on the Saturday in question at 12:30 o'clock. One Shaw testified that he was foreman on the work on Park avenue; that More arrived at these premises about twenty minutes to 12 on that day and that he and the witness then made out the pay roll and paid off the men and then went over the job; that he left the building about 1 o'clock, leaving More there. Shaw's pay check, dated June 3, 1912, which he testified he received that day between 12 and 1 o'clock, was introduced in evidence. One McNeely, a half brother of

Shaw's, testified that he was at the Park avenue building that day and first saw More there about a quarter of twelve o'clock and that he and his brother left the building about a quarter of one, leaving More there.

Frank L. Childs and George W. Mason, the two lawyers who had offices in the same suite with More and Smith testified for the defendant. Childs testified that Kibbey came into the reception room on the Saturday in question around half past twelve or one and asked for the man who wanted the automobile and he directed him to Smith who was then sitting at his desk; that Kibbey then walked over to Smith and the two engaged in conversation; that More was not in the reception room at this time but he did not know whether he was in his private office or not; that the witness attended the coroner's inquest after the accident at the request of Smith.

Mason testified that he loaned some money to the owners of the Lincoln Park Garage and, as security, took a chattel mortgage on several automobiles; that on May 3, 1912, he received four automobiles in lieu of the mortgage security and received bills of sale covering them, one of which was the automobile driven by Kibbey on the occasion in question; that he took possession of the car at that time and had it taken to the Apollo Garage; that he saw Smith and Kibbey getting into that car in front of the Title & Trust Building on Saturday June 8; that the witness was the owner of this car for several months; that John was employed by him as a clerk and that he was then in France.

Ganaler, one of the owners of the Lincoln Park Garage, testified that he received Smith's check, given in payment of the new tire on Sunday morning; that one Shimmel, an employee of the garage who had sold Smith the tire, handed the check to the witness in the presence of Smith and Kibbey; that, at Smith's direction, he retained \$20.00 from the proceeds of the check, in payment for the tire and handed \$15.00 to Kibbey, Smith saying in the presence of Kibbey that \$12.00 was for driving and \$3.00 for oil and gasoline. Smith's \$35 check is in evidence.

The defendant himself, was disqualified as a witness, on some matters, under the statute. He testified, however, that on the Saturday in question he arrived at the Park avenue building shortly before 12 o'clock and left there between 2 and 3 o'clock; that he was there paying off the workmen and inspecting the work; that he did not see Kibbey on Saturday, June 8 or have any conversation with him on that day; that he did not see the men from Janesville on that day; that he first met these men, "about a month ago," at Janesville; that John never worked for the witness; that when Kibbey left the County Jail sometime in September he asked the witness if he would give him a dollar, that he had no money and nothing to eat; that he gave Kibbey one dollar and also five at this time; that this was a gift and not in payment for any services; that he never saw a woman who claimed to be Kibbey's wife.

Plaintiff contends that the evidence of Childs and Mason to the effect that Smith was in the Title & Trust office when Kibbey came in and that he was the one with

when Kibbey talked and that Smith then rode away with Kibbey in the automobile, (some of these facts being testified to by Childs and some by Mason) is squarely contradicted by the Janesville witnesses in their testimony when they say they met Smith at the offices of the Operating Company in the McCormick Building at noon that day. Childs testified that Kibbey came into the office and talked with Smith, "Around half past twelve or one o'clock." Berg testified that he and his friends returned from Sears, Roebuck & Co. to the McCormick building and found Smith there "about twelve o'clock." Another of the Janesville men who testified put it at "about a quarter to one" and the third one who testified said that the first time he saw Kibbey was "about quarter to one, I guess." Plaintiff's contention that the testimony of Berg is to the effect that Smith remained at the office in the McCormick Building from the time of their return from Sears, Roebuck & Co. until they started out on their automobile ride, is not borne out by the record. We do not consider the testimony of Childs as to the time of Kibbey's alleged talk with Smith in the Title & Trust Building and that of the Janesville witnesses as to the time of Smith's presence in the McCormick Building as contradictory or irreconcilable. On the other hand the testimony of Kibbey as to the time of his alleged talk with More in the Title & Trust Building and the testimony of More, the defendant, corroborated by Tobison, the carpenter, Shaw the foreman and McNeely the latter's half brother as to the time of the defendant's presence at the Park Avenue building, some miles from the Title & Trust Building, is in hopeless conflict. Kibbey says he talked with More

in his office at the Title & Trust Building at "between one-thirty and two." Tobiasson says More paid him off at the Park avenue building at twelve thirty. Shaw testified that More reached the Park avenue building about twenty minutes to twelve and that he was still there when he left the building "about one o'clock." McNealey's testimony is about the same and More testified he reached the Park avenue building "shortly before twelve and left there between two and three o'clock."

These conflicts as to the time, however, are not the most serious to be found in the testimony. Kibbey's testimony to the effect that More told him to take "my car" and that the car "belonged to More," - a pure conclusion, - is contradicted by the testimony of Mason, corroborated by that of Robertson, one of the owners of the Lincoln Park Garage who testifies to delivering the car to Mason when he took it in lieu of certain chattel mortgage security on an indebtedness from him and his partner to Mason and also corroborated by the bill of sale from Robertson and his partner Gansler to Mason. Kibbey's testimony that More told him to drive "these gentlemen" around the city is materially weakened by his admission on cross-examination that when he was in the Title & Trust Building office "these gentlemen" were no where to be seen. Kibbey never talked to More at all if Childs and More are telling the truth. Kibbey's testimony that he never saw Smith that day until he picked him up at the Plaza Hotel late that night, cannot be so if Childs, the three Janesville witnesses, Gansler and Mason are telling the truth. Kibbey's testimony that John and the Janes-

ville seen get in the car with him on Saturday at the Title & Trust Building is contradicted by the Janesville witnesses and also by Mason. The latter testified he saw Smith getting into the car with Kibbey and the Janesville witnesses all say they entered the automobile in front of the McCormick Building. According to their testimony they were not in the Title & Trust Building at all on Saturday. The Janesville witnesses say they did not meet John until they reached the Plaza Hotel that afternoon and that Smith was with them up to that time. Kibbey's testimony that he was paid something by More for driving the car is denied by the latter. His testimony that he received nothing for his services (aside from what he alleges More paid him) is contradicted by the witness Gansler. If this verdict is to stand, it must be by virtue of Kibbey's testimony alone. That testimony is not only not corroborated but it is denied or flatly contradicted by practically every other witness in the case, some of them witnesses for the plaintiff and three of the witnesses reputable members of the Bar and also by documentary evidence. That such should be the result is unthinkable.

We have analyzed the testimony rather fully because two juries have found the issues for the plaintiff, a fact which should not cause the court to hesitate to reverse the judgment where, in its opinion, the facts require it. Farrell v. Bruce, 200 Ill. App. 523.

It is not difficult to account for the verdict in spite of the evidence. A husband had been killed

outright by reason of the gross carelessness of the driver of the automobile. From remarks made by counsel for the plaintiff in the opening statement, followed up by some questions put to witnesses, which were properly sustained, but which nevertheless added to the impression given by the remarks referred to, the jury had been given the idea that this defendant was the owner of a number of automobiles and thus presumably in affluent circumstances and well able to compensate the bereaved widow, so far as that could be done financially, and remarks were also made by plaintiff's counsel in his opening statement giving the impression that More was interested in getting some stock sold to the Janesville men, through Smith, a matter which was not attempted to be shown in the testimony, the evidence establishing on the contrary that the Janesville men or some of them had previously bought some stock from Smith in a company in which it was not shown More had any interest whatever.

Because of the conclusion we have reached on the evidence, it will not be necessary to pass on the errors assigned on other points. For the reasons we have given the judgment of the Circuit Court is reversed with a finding of fact.

REVERSED
WITH A FINDING OF FACT.

FINDING OF FACT:

We find as a fact that the automobile which struck and killed plaintiff's intestate, was not owned by the defendant and that the driver of the auto-

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mobile was not his servant and in no way in his service.

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289 - 24640

BERTHA M. HAHN,

Appellee,

vs.

HERMAN HAHN,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COCK COUNTY.

215 I.A. 640

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

This is an appeal by the defendant from a decree obtained by the complainant in a suit brought for a divorce on the ground of adultery.

The defendant denied the adultery alleged and he contends that the evidence did not warrant the finding of the chancellor to the contrary. The law on this subject is well settled and there is no dispute as to this between the parties. To warrant a decree of divorce on this ground, the carnal act must be established by the evidence. It will never be presumed. Ovenu v. Ovenu, 201 Ill. App. 607. It need not be proven by direct evidence, however, but will be considered as sufficiently established if such circumstances are proven as would "lead the guarded discretion of a reasonable and just man to the conclusion," that adultery had taken place. Stiles v. Stiles, 167 Ill. 576. The dispute between the parties in the suit at bar is as to whether the evidence was sufficient to prove the charge so as to bring the case within the rules as thus laid down by our courts.

The parties were married in 1890. They have three boys, the youngest about 18 years of age and the eldest about 26, the two eldest being married. They separated November 13, 1917. The bill was filed March 21, 1918. We have carefully examined all the evidence as it appears in the record. The defendant after leaving his wife, went to live with a Mrs. Moyer, in her four room apartment on Winona avenue in the City of Chicago. Among other things the complainant testified that she watched this apartment and saw her husband and Mrs. Moyer eating supper together and later saw him helping her with the dishes, and still later saw him undressing in the front room; that previous to this she had become more or less suspicious about him because she had found love letters in his pockets showing he had been intimate with other women; that on one occasion he had told her that he was diseased; that the name at the door bell of Mrs. Moyer's flat was "Jeanette Maan." In describing the alleged undressing, she said she saw him take off his coat and vest in the bed room; that the lights in the bedroom were lighted and the shades partly up and "these two people were in there - they were undressing * * * I saw her undress * * * I saw them turn out the light; they disappeared a long time * * * I could see the brass bed * * * I did not see anybody in the brass bed". She testified that on another occasion when the defendant and Mrs. Moyer were in the kitchen or adjoining pantry she heard the latter tell defendant that she was going to "scrub and clean this flat of ours." Walter, one of

the sons, testified that on March 19, 1918 he watched his father and Mrs. Moyer in the Winona avenue apartment; that he saw nothing wrong there; that he went to the door and rang the bell and he asked the woman who answered, if she was Mrs. Haan and she said she was and he then asked if he could speak with Mr. Hahn and the woman said he was not at home; the witness then told her he had seen them both in the apartment and that he was Mr. Hahn's son, whereupon the woman said, "you can not see him." The witness then left the apartment and walked to the corner and then saw defendant leaving the apartment by the back entrance. He testified he followed and overtook his father who looked surprised and asked what he was doing there; that his father told him that it was too expensive, living at a hotel and he had gone to board with the woman in question for the sake of economy; that by a coincidence her name was "Haan"; the witness told his father he had seen him and the woman during their evening meal and his father said, "You didn't see anything wrong, did you?"

It might be successfully contended that this evidence was not sufficient to prove adultery but merely gave rise to some rather strong suspicions in that direction. The defendant denied any improper conduct with Mrs. Moyer. He said she was a good woman whom he had met two or three years previously, through a business friend; that she was in the neighborhood of fifty years of age (as was defendant also) and had grown children. In our opinion, the defendant's position was somewhat weakened by the multiplicity of reasons he gave for

going to live at Mrs. Moyer's apartment. First it was to economize, her rates for board and room being much less than he would be obliged to pay at a hotel and then it was because he was ill and needed care which his wife refused him,- that he was too ill to go to a hotel and he did not want to go to a hospital and Mrs. Moyer was willing to give him the care and attention he needed, for which he paid her. Evidence was given by other witnesses for the complainant which, when taken in connection with the other evidence to which we have referred, we deem decisive of the issue as to the alleged adultery. One Dix, a real estate agent, testified that late in September or early in October 1917, the defendant and Mrs. Moyer came to the office and "he made an application for an apartment" saying "he was helping get an apartment for this lady." The witness asked for references and Mrs. Moyer gave some which turned out to be satisfactory; defendant said he lived in Minneapolis and his references were all there. The witness further testified that "they wanted the apartment right away and then suggested that he would pay the entire year's rent in advance providing there was some discount on it;" that the witness told him he would take the matter up with the owner and he made an appointment with them for the following morning; that the defendant made a deposit on the flat on their first visit to the office. The following morning they returned to the office and met the owner of the flat; the rent was agreed upon and Mrs. Moyer signed the lease. The witness testified that at that time the defendant said that Mrs. Moyer was to get a divorce in two or three months and that they then expected to be married and he then asked the owner if he would care if he called to see Mrs. Moyer

occasionally and he was told it would be all right. He also testified that the original deposit of \$10 was paid by the defendant and that he made a payment of \$50 two or three days later and that the balance of the year's rent was brought into the office some time later when the witness was not there and he did not know who brought it in. Mr. Sasser, the owner of the apartment, testified that when the lease was signed, the defendant told him that he was not married to Mrs. Moyer but that he expected to be in the course of about three months,- that she was to take the apartment and when they were married he expected to live with her; that he then asked whether the witness would have any objection if he went over there and got a meal occasionally and he was told there would be no objection to that. The witness said he had seen the defendant around the apartment but had never seen anything wrong with either of them. This witness also testified that the name on the bell was "Haan"; that the defendant said he was from Minneapolis and that he and Mrs. Moyer were to be married as soon as she procured her divorce. The home of the defendant and his wife was on Newgard avenue in the City of Chicago, about two miles distant from the Winona avenue apartment. The defendant testified that Mrs. Moyer made all the payments on the apartment and that on a previous occasion she had rented premises for the purpose of keeping roomers and boarders and had lost on the venture and on the occasion in question she asked him to advise and assist her, which he did; that the remark about Minneapolis was made by Mrs. Moyer and was to the effect that she had lived there former-

ly; that the remark about his going to the flat was not made by him but by Mrs. Moyer and that she wanted to know if it was permissible to have anyone come up there; that the idea the witness had was she was referring to roomers. The defendant was asked if there was anything said about marrying and his reply was, "Marrying who,- Oh, in a joking way she said 'Well, I am just a widow * * * I might get married again some day,' and she wanted to know if it would be all right to have anybody come up and call on her, and they told her, yes." The defendant said he had lived at Mrs. Moyer's apartment, practically since he left his wife; that the front room was his room and Mrs. Moyer slept in the dining room which was "a dining room and bed room together;" that he had never had any improper relations with her and never had undressed in her presence beyond removing his coat, vest and shoes. He alleged he had never had improper relations with any woman; denied he had ever been diseased and said the trouble referred to by the complainant in her testimony was bladder trouble.

We have stated the substance of the evidence in the record which seems important on the question of adultery. The remarks made by the defendant at the time the apartment was rented as testified to by the agent and the owner, are very illuminating as to why the defendant shortly thereafter left his wife and took up his abode with Mrs. Moyer in her four room apartment at which time she assumed the name of "Mrs. Haan". The explanation of these remarks by the defendant is exceedingly weak. He attributes them to Mrs. Moyer, characterizing them as made in a joking way. So far as this trial was concerned

Mrs. Moyer was conspicuous by her absence. In our opinion the chancellor did not err in finding that the charge made in the bill had been proven by the evidence.

The defendant complains further of that part of the decree fixing the property rights of the parties and the alimony. It would extend this opinion to an unwarranted length and serve no useful purpose to even outline the somewhat lengthy evidence on this issue. The court found that certain property in Omaha, legal title to which was in complainant, equitably belonged to her. She had inherited a three-eighths interest in this property and the balance had subsequently been purchased from funds accumulated from her share of the rents supplemented by other funds borrowed by defendant from his father and later repaid. This property nets complainant an income in the neighborhood of \$1660 per year. She has the custody of the minor son who is employed at a salary of \$35 a month. The defendant owns investments from which his annual income is \$1500. He owns a membership on the Board of Trade of Chicago, for which he paid \$2100. During the year previous to the trial of this case, his income from his grain commission business was \$940 and for several years previous to that it had been about \$2000 per year. The family home in Chicago which the complainant no longer occupies, title to which is in defendant, has a rental value of about \$600 a year. At the time of the trial the defendant had \$1,100 in the bank. The court awarded complainant alimony in the sum of \$75 per month which we deem to be just under all the evidence. It will always be in the power of the court

-8-

to make such changes in that amount as altered circumstances may demand.

Finding no error in the record the decree of the Superior Court is affirmed.

AFFIRMED.

301 - 24652

ETHEL MELBYE,

Appellant,

vs.

HARRY MELBYE,

Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

215 I.A. 641

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

This is an appeal by the complainant from a decree dismissing her bill for divorce on the ground of desertion, for want of equity.

The parties were married in 1910. The defendant left the complainant in January 1913. Shortly thereafter the complainant brought the defendant into court, charging him with non-support of herself and their two children. An order was entered requiring him to support his family. After complying with the order for a few months, he made default and was sent to the House of Correction for six months. After his discharge from the House of Correction, he did not return to his family but continued to live apart from them. In September 1917, the complainant again brought a non-support charge against him. He pleaded guilty and was again sentenced to the House of Correction for one year and fined \$600.00. He was serving this sentence when this bill was filed in February 1918. There was personal service of the summons in this case and the defendant defaulted.

As to the alleged desertion, the complainant testified that after she and the defendant were married they lived

with her mother; that "he started to bum around at night and wouldn't work and my mother insisted on him * * * either paying the rent or he would have to get out." He promised to work but did not do so and finally got out. From the testimony of the plaintiff's mother it appears that after they had lived with her some seven months she told him he would have to pay something or leave and he left and that he later returned and as she put it, she gave him three chances after that. Finally he went to work in a position where he was to be paid every two weeks. The witness said she supplied him with carfare during the first two weeks and at the end of that period she asked him if he had received his money and he said "No, the company is bankrupt." He left for work one morning and never returned. The sister of the complainant testified, apparently referring to the last time defendant left, "My mother said if he did not work and pay board for the family, the children and wife, that they would have to look for another place. He went away in the morning and never showed up after that."

The court refused to dispose of the case until the defendant was brought in and had a chance to be heard. He was brought in and testified that "the cause of the separation was that I was compelled to leave. In the first place I was locked out and furthermore I was threatened with my life if I ever came back * * * the mother of my wife threatened me * * * I didn't give them anything because I was deprived of the pleasure of seeing my children." He testified further that when he was put out he did not owe any rent and that he gave all his wages to his wife except carfare. He also said that his wife was running around with some other man. It seems impossible that

these statements could be true and the defendant plead guilty to a second charge of non-support and submit to a fine of \$600.00 and a sentence of one year in the House of Correction. We deem the defendant's testimony unworthy of belief. The trial judge remarked after hearing his testimony "His conduct shows he was a worthless fellow, but he did not desert his wife."

The complainant asked leave to dismiss her bill without prejudice. The court denied that motion and dismissed the bill for want of equity. In denying the complainant's motion the court committed error. She had a right to dismiss her bill at any time before a decree was signed. Reilly v. Reilly, 139 Ill. 180; Langlois v. Matthiessen, 155 Ill. 230; Paltzer v. Johnston, 213 Ill. 338; Fischheimer v. Kupersmith, 258 Ill. 392.

But further, in our opinion, the evidence submitted by the complainant, established the charge of desertion. The question is, did the defendant absent himself from the complainant, "without any reasonable cause?" We believe he did. A man cannot make his home with his mother-in-law and fail to support his wife and children, and upon being told that if he does not support them, "they will have to look for another place", leave and absent himself from his wife for the statutory period, and successfully contest a suit for desertion. Nor is the situation changed if his mother-in-law tells him to either support his family or get out. It is the husband's duty to make a home for his family. It is apparent from the testimony that this defendant made not the slightest effort to do so. When he left the home of his mother-in-law he

did not take his family with him nor make any attempt to. He might have continued to live with his wife in her mother's home if he had supported her and the children as he should have. It is established by the evidence that, in leaving, his purpose was to absent himself from his wife and that he even preferred living in the House of Correction to making a home for her. Upon being charged with desertion he attempts to shift the burden to his wife's mother. The evidence does not show that she did anything to furnish him with a reasonable cause for his absenting himself as he did. To have justified his absence as a reasonable cause, the thing that occasioned it must have been such as would have entitled him to a divorce. Fritz v. Fritz, 138 Ill. 436; Frank v. Frank, 178 Ill. App. 557. No such reason for his absence appears from the testimony submitted in behalf of the complainant and for the reason we have given, we can give no weight to his testimony.

The decree of the Superior Court is therefore reversed and the cause remanded to that court with directions to enter a decree for the complainant as prayed for.

REVERSED AND REMANDED
WITH DIRECTIONS.

319 - 24670

VACLAR MATOUSEK,

Appellee,

vs.

CHARLES STANULAK,

Appellant.)

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

215 I.A. 641

MR. PRESIDING JUSTICE THOMSON delivered the opinion
of the court.

This is an appeal by the defendant by which
he seeks to reverse a judgment for \$629.46, recovered
by the plaintiff in an action of the fourth class in
the Municipal Court of Chicago.

The defendant contends that the plaintiff's
statement of claim did not set forth a good cause of
action and therefore is insufficient to sustain the
judgment. The statement of claim alleged that on or
about July 20, 1911 the parties entered into a contract
in writing for the construction of two buildings at
4518 and 4520 Lefflin street in the City of Chicago;
plaintiff to furnish all labor and necessary material,
according to certain plans and specifications; that
according to said plans and specifications the build-
ing at 4518 was to be 22 feet wide; that on or about
August 1, 1911, the defendant employed the plaintiff
to do certain extra work and furnish certain extra
material for that building, after the contract refer-
red to had been entered into and the work was in pro-
gress, such extra work being for the purpose of con-

structing said building two feet wider than the plans and specifications provided for and this the plaintiff then and there agreed to do and to furnish all necessary labor and material therefor; that pursuant to said contract for the performance of such extra labor and the furnishing of extra material, plaintiff furnished the same and built said building two feet wider than the plans and specifications provided for. The statement of claim then set forth the extra material and labor furnished in detail and the prices for each item, aggregating \$547.26 which was alleged to be a reasonable price for the extra work performed and extra materials furnished. It was further alleged that during the progress of the work on the building at 4520, the defendant requested certain changes and extra work to be done and employed the plaintiff to do the same and that plaintiff performed extra work and furnished extra material for said building as set forth in detail in the statement of claim and that a reasonable price for said extra work performed and materials furnished was \$122.75, making a total of \$670.01 claimed for extra labor performed and materials furnished. It was further alleged that the plaintiff performed said contract and furnished the extra labor and materials and completed the buildings and that he had been paid on account thereof \$7,497.00 and that there was due the plaintiff on the original contract, a balance of \$228.00 making the total of plaintiff's claim, the sum of \$898.01.

In his affidavit of merits the defendant alleged that the provisions of the contract with regard to any extras that might be determined upon, included a number of conditions precedent and that under the terms of the

contract the plaintiff could not recover for any extra work performed, unless such conditions were complied with by him and it is the defendant's contention that the statement of claim is fatally defective in that it fails to allege that such conditions precedent were complied with.

It has frequently been held that where work has been done under a building contract, the plaintiff can only recover therefor when he has fully or sufficiently performed the conditions precedent to his right of recovery as stated in the contract, or else averred and proved a sufficient excuse for his non-compliance with its conditions. Hart v. Carsley, 221 Ill. 444; Brenton v. Newlin, 161 Ill. App. 168; Levin v. Strempler, 194 Ill. App. 299. A contractor who has done work under a building contract cannot bring suit for the compensation which he claims is due him and file a declaration containing the common counts, or a special count alleging performance, and secure judgment, on evidence disclosing non-compliance with certain conditions in the contract, and an excuse for such non-compliance, even though the excuse be sufficient. In such a case the plaintiff can only recover on a declaration which declares upon the contract and contains allegations setting up the reasons why the conditions in question have not been complied with. Hart v. Carsley Mfg. Co., supra; Metal Fireproofing Co. v. Boyce, 233 Ill. 284. Where the declaration alleges performance of the contract and the evidence discloses a non-compliance by the plaintiff with certain conditions precedent and an excuse for such

non-compliance, there is a fatal variance. Universal Floor Co. v. Stiles Construction Co., 210 Ill. App. 63.

These authorities, however, are not applicable to the issue presented on this appeal. There is nothing before us but the common law record for, on motion of the plaintiff the bill of exceptions has been stricken. In this state of the record we are obliged to assume that the evidence was sufficient to establish all the allegations of the statement of claim as to the performance of all the terms of the contract. Without some evidence in the record tending to support the contention of the defendant as to the presence of conditions precedent in the contract and a non-compliance with these conditions by the plaintiff, we cannot say that the statement of claim does not set forth a good cause of action.

The defendant complains of an instruction, a matter upon which we cannot pass without the evidence which, as stated above, is not before us. There are other points stated by the defendant in his brief but not referred to in his argument. The defendant must be considered as having waived such points and they are therefore not considered.

Finding no error in the record, the judgment of the Municipal Court is affirmed.

AFFIRMED.

122 - 24428

MARIE H. L. KLEINFELDT, a minor,
by William Kleinfeldt, her
father and next friend,

Appellee,

vs.

CHICAGO EYE SHIELD COMPANY,
a corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

215 I.A. 641

MR. JUSTICE O'CONNOR delivered the opinion
of the court.

Marie H. L. Kleinfeldt, a minor, by her next
friend, brought suit against the Chicago Eye Shield Company,
a corporation, to recover damages for personal injuries.
There was a verdict and judgment in her favor for \$5000.00,
to reverse which the defendant prosecutes this appeal.

The declaration consisted of three counts. The
first two counts alleged in substance that prior to Sept-
ember 27th, 1915, the plaintiff, a minor under the age of
sixteen years, was employed by the defendant contrary to
the provisions of Section 11, Chapter 48 of the Revised
Statutes of Illinois, which section makes it unlawful to
employ children under the age of sixteen years to do cer-
tain specified work; that after she had worked there for
a time cleaning glasses of goggles, she was put to work
operating a punch and stamping machine. And while so en-
gaged her hand was caught and crushed by the machine, nec-
essitating the amputation of certain portions of her fingers.
The third count was a common law count of negligence which
was withdrawn before the case was submitted to the jury.

The defendant filed a plea of general issue

140 JUL 1952

and a special plea setting up the defense that as both parties were operating under the Workmen's Compensation Act of Illinois, the action would not lie. To the special plea the plaintiff interposed a demurrer which was sustained, so that the case was submitted to the jury on the two counts of the declaration and the general issue.

It is not controverted that at the time of the injury plaintiff was fifteen years, five months and twenty days old; that she was employed by the defendant on the second day of August, 1915, and was put to work washing glasses in goggles and stringing rubber through the goggles. The afternoon of the day before the accident she was put to work on the machine at which she was injured. She worked on the machine the balance of the day; also on the next day until the time of the accident in the forenoon. The machine was driven by electricity. It was operated by a foot lever and two buttons, which caused the punch to ascend and descend. To operate the machine the plaintiff was required to hold metal pieces, about the size of a silver dollar, under the punch for the purpose of punching holes in them. The machine caught the plaintiff's right hand and crushed the index, middle and ring fingers, which necessitated the amputation of portions of the fingers. She was taken to the hospital where she remained for some time. After the accident and until December 9th, 1915, the defendant paid to the plaintiff Six Dollars per week compensation, as it claimed the Workmen's Compensation Act applied.

The defendant contends that the Circuit Court was without jurisdiction because the parties came within

the Workmen's Compensation Act. As we understand, the argument is that Par. 2 of Sec. 5 of that Act provides that minors who are legally permitted to work are to be compensated for injuries sustained by them in the course of their employment in accordance with the provisions of that Act. And that plaintiff was legally employed because of Sec. 11, Chap. 48, R. S. forbids the employment of children on machines mentioned in that section only if such machines may be considered dangerous to the lives and limbs of the children so employed. We think this is a misapprehension of the meaning of that section. It expressly provides that no child under the age of sixteen years shall be employed to do certain kinds of work, among which is the operation of a punch or stamping machine such as the one the plaintiff was operating at the time she was injured. And after the enumeration of these the statute adds that such children shall not be employed in "any other employment that may be considered dangerous to life or limb, or where their health may be injured or morals depraved." This last provision was clearly intended to embrace other occupations not specifically enumerated that might endanger the physical or moral well-being of children so engaged. Moreover, it is plain that the machine in question was exceedingly dangerous. There is no merit in the contention. Plaintiff being under sixteen years of age, employed contrary to the provisions of the statute, and, injured as a result of her employment, presents a situation that renders the defendant liable. Roszek v. Bauerle & Stark Co., 282 Ill. 557; American Car Co. v. Armentraut, 214 Ill. 509; Strafford v. Republic Iron Co., 238 Ill. 371; Purtell v. Philadelphia Coal Co., 256 Ill. 110; Zurasky v. Handycap Co., 210 Ill. App. 254. This also disposes of

defendant's objections to instructions given on behalf of the plaintiff, which, it is argued, were wrong because they authorized a recovery even if plaintiff were negligent and the machinery not dangerous. The question of the negligence of the plaintiff is unimportant under the authorities cited.

The defendant also argues that it was error to permit the mother of the plaintiff to testify, over its objection, that prior to the injury, the plaintiff played the piano, but since that time she had not done so. This is based on the ground that this is an element of "particular damage" and there is no allegation of such damage in the declaration. Under the facts in the instant case, the only possible effect of this testimony would be to increase the damages, and since there is no objection made that the judgment is excessive, there is no merit to the point.

The further contention is made that the court erred in not permitting defendant's counsel to cross-examine the plaintiff as to what she said her age was when she applied for employment. The defendant admits that even if the plaintiff did make a false statement as to her age, it would be no defense. But argues that as the age of the plaintiff was the gist of the action, the jury were entitled to know what she said so that they could determine whether she was under sixteen years. When objections were made to these questions, the matter was argued in chambers by counsel, and no contention was there made that what the plaintiff said as to her age was competent in determining what her real age was, but it was there contended that the defendant had a right to

have all of the conversation. So that it clearly appears that the point is made for the first time in this court, which, of course, cannot be permitted. Furthermore it was not cross-examination, as the witness has not testified concerning her age. Objection is also made that it was error for the court to refuse to permit the defendant's witnesses to testify what plaintiff said her age was when she applied for employment.

There is nothing in the record to show what these witnesses would have testified to in this regard if permitted. In fact, counsel for the defendant admits he did not know what their testimony would be on this point. Nor is there any contention that the age of the plaintiff as testified to by other witnesses was not her correct age, viz: that she was under sixteen years, so that no harm was done the defendant.

The liability in this case is clear. There is little or no controversy about the facts, nor can there be any as to the law. The record is free from any substantial error.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

138 - 24445

RALPH W. CONDEE, (Plaintiff)

Defendant in Error.

vs.

MICHAEL ZIMMER, Sheriff, (Defendant)

GUSTAV MUELLER,

Plaintiff in Error.

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

215 LA 641

MR. JUSTICE O'CONNOR delivered the opinion
of the court.

The plaintiff brought suit in replevin against the Sheriff to recover the possession of certain chattels. The writ was directed to the Coroner and served by the latter, who took the goods from the Sheriff and delivered them to the plaintiff. The Sheriff had obtained possession of the chattels by virtue of a writ of attachment issued out of the County Court in the suit of Mueller v. Neumeister. At the close of all the evidence there was a directed verdict for the plaintiff, to reverse which Mueller prosecutes this writ of error. The record discloses that Mueller had obtained a judgment by confession against Neumeister in the Municipal Court of Chicago. Some few years later an execution was issued on this judgment and given to Cernak, the bailiff of that Court, who levied upon the property involved in the instant case. A few days thereafter, Condee the plaintiff in this case, brought a replevin suit against the bailiff in the Circuit Court of Cook County. The property in question was delivered to Condee under the replevin writ. A day or so after, Mueller brought a suit in attachment in the

County Court against Neumeister, and the Sheriff levied on the goods which were then in Condee's possession. The next day Condee instituted the instant case of replevin, and the goods were taken by the Coroner from the Sheriff and delivered to Condee. On the trial in the County Court there was a finding and judgment against the plaintiff for costs, which on appeal was reversed by this Court. (Mueller v. Neumeister, 263 Ill. App. 393.)

When the replevin suit of Condee v. Cermak came on for trial before Judge Walker of the Circuit Court, it appeared that the judgment of the Municipal Court in favor of Mueller and against Neumeister had, on motion of Neumeister, been vacated and set aside. This necessarily carried with it the execution under which Cermak, the bailiff, held the goods, and on the trial before Judge Walker, after a jury had been waived by agreement, the case was heard and the court found "the defendant guilty and that the title and right to possession of the property is in the plaintiff" and the plaintiff's damages were assessed at one cent. Judgment was entered on this finding. Some few months afterwards, the second replevin suit, the case at bar, came on for trial before Judge Gibbons of the Circuit Court with the result before stated.

There is no evidence to sustain most of the facts we have just stated, but as Judge Cary once said in delivering an opinion of this court, this "omission has been supplied by counsel in their briefs", and seems to be undisputed. The plaintiff contends that the judgment entered in the first replevin suit tried before Judge Walker is res judicata of all material questions in the instant case. The point in

controversy in the replevin cases was whether the property involved belonged to Condee, as he contended or to Neumeister, as Mueller contended. The defendant's position, as we understand it, is that since the judgment in the Municipal Court in the case of Mueller v. Neumeister, and out of which the execution issued under which the bailiff took possession of the chattels had been set aside; therefore, in the replevin suit before Judge Walker, the defendant could not recover and, of course, the issues were necessarily found in favor of Condee. This is a misapprehension of the law of replevin, for Condee in the replevin suit before Judge Walker could not recover on the weakness of Cermak's title, but he must recover on the strength of his own case and, therefore, in view of the judgment entered before Judge Walker, we must assume that there was sufficient evidence to warrant the court in finding as was done, that Condee was entitled to the possession of the property on account of his title to it.

The defendant also contends that the judgment entered before Judge Walker, a certified copy of which was introduced in evidence in the trial of the instant case, was improperly admitted, over his objection, and could not be res judicata for the reason that it does not appear that Mueller was a party to it. We think this position is untenable. There is no controversy but that Cermak had possession of the property under the execution issued on the judgment which Mueller obtained against Neumeister in the Municipal Court. This execution was the sole authority for the property being in the possession of Cermak, the bailiff. The person really in interest in the proceedings before Judge Walker was not the bailiff, but Mueller.

The defendant makes the further point that even if it be considered that Condee was entitled to the possession of the property at the time of the institution of the replevin suit which was tried before Judge Walker, yet there is nothing to show that he was entitled to possession at the time the instant replevin suit was started, a day or two later. There is nothing that tends to show that the rights of the parties had at all changed, nor is there any such contention made, as a matter of fact.

The plaintiff, in addition to introducing the judgment obtained in the replevin suit before Judge Walker, also offered testimony tending to show that the property in question was his property and not Neumeister's. When the defendant sought to overcome this testimony and to establish that the property belonged to Neumeister and not Condee, objections were interposed by the plaintiff and sustained. Of course, if the plaintiff was entitled to show that he owned the property and not Neumeister, the defendant would be entitled to introduce evidence to show that the contrary was the fact. But in the view we take of the case, none of the evidence introduced on this phase of the case was proper, so that the error was not one that prejudiced the defendant. The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

The following table shows the results of the

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150 - 24495

MAX BLUM and LOUIS NAGLER,

Appellees,

vs.

ALEXANDER EISENSTEIN and
SAMUEL EISENSTEIN,

Appellants.

APPEAL FROM

MUNICIPAL COURT,

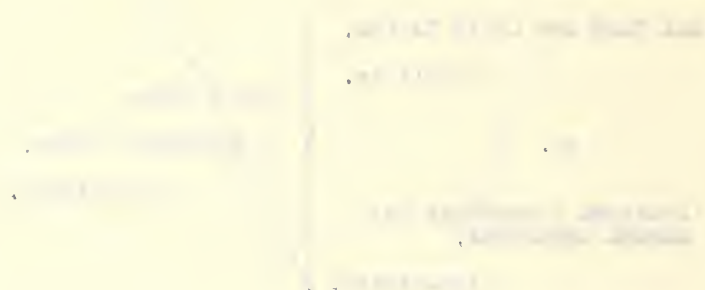
OF CHICAGO.

215 I.A. 641

MR. JUSTICE O'CONNOR delivered the opinion
of the court.

The plaintiffs, who were tenants of the defendants, brought suit to recover damages for failure to properly heat the leased premises. There was a finding and judgment in plaintiffs' favor for \$305.00, to reverse which the defendants prosecute this appeal.

The record discloses that on October 23rd, 1914, the parties entered into a written lease. The premises were known as 3515-3517 West Twelfth Street, Chicago, and were to be occupied by plaintiffs as a billiard hall, restaurant, and cigar store. The lease was for a period of five years and was partly printed and partly in writing. It contained the following written provision: "Party of the first part (defendants) is to furnish heat from October 1st to May 1st of each year, and hot water all year around. Party of 1st part not to be held liable for any failure to give steam through no fault of their own or for any other reason." The plaintiffs contend that the defendants broke this provision by their failure to furnish heat during the hours from about nine p.m. until six a.m. It is conceded that defendants furnished the necessary heat from six a.m. until



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about nine o'clock in the evening. While there is some conflict in the evidence, it tends to show that at the time of the letting the defendants knew that plaintiffs intended to operate a restaurant all night and the billiard hall until one o'clock in the morning; that shortly after the plaintiffs entered into possession they complained to the defendants that the premises were not heated during the night time and that the defendants refused to furnish heat during such hours. About December, 1916, the plaintiffs, in order to warm the place so that business could be conducted during the night time, installed certain gas heating apparatus, and the cost of this is included in the amount of their claim, as well as damage to other property of the plaintiffs, occasioned by the premises being cold at night.

The defendants contend that, under the provision quoted, they were not required to furnish heat during the night time as the provision exempts them from damages of all kinds occasioned by their failure to furnish heat at any time. A number of authorities are cited on both sides in the briefs which, in our opinion, it will be unnecessary to discuss for the reason that it is clear that the only question involved is, what was the intention of the parties as expressed by the language quoted?

It will be seen that defendants agreed to furnish heat from October first to May first of each year, and the next sentence we think clearly means that they shall not be liable in damages for failure to furnish heat for any reason whatever. It might well be that if no heat at all was furnished the tenants would be justified in vacating the premises, but if they chose to continue to occupy them under the clear wording of the provision of the lease, they could not recover

any damages from the defendants. The function of courts is to enforce contracts, not to make them. In the instant case, the parties having expressly agreed that the defendants were not to be held liable in damages for failure to furnish heat for any reason, they must abide by their contract and no recovery can be had. The judgment of the Municipal Court is reversed.

REVERSED.

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156 - 24502

JAMES S. DEMING, Administrator
of the estate of Zelich Leppa,
Deceased,

Plaintiff in Error,

vs.

PINKUS ADLER,

Defendant in Error.

215 I.A. 642

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE O'CONNOR delivered the opinion
of the court.

James S. Deming as Administrator of the Estate
of Zelich Leppa, deceased, brought suit under Chapter 70,
Revised Statutes, against Pinkus Adler to recover damages.
At the close of plaintiff's case there was a directed ver-
dict for the defendant.

So far as material, the facts are these: the
deceased was a tenant of the defendant of certain premises
in Chicago. The tenancy was from month to month. The de-
ceased rented the premises and entered into possession
about February, 1914. Certain repairs were afterwards made
by the defendant. The premises were occupied by the deceased
as a fish store in front, with living rooms in the rear.
About two or three weeks before deceased was injured, a
piece of plaster about eight by ten inches fell from the
ceiling in the kitchen. At that time the defendant was in
the fish store and was told of the condition of the plaster
in the kitchen. The defendant then went and looked at it
and said he was going to fix it. About three weeks after-

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wards, the repairs not having been made, the deceased was in the kitchen one night about eleven o'clock washing himself at the sink, when the plastering from the ceiling fell striking the deceased, causing him to fall unconscious to the floor. He was shortly afterwards picked up in an unconscious condition and put to bed, and the doctor immediately called. There were numerous injuries about his head, shoulders and body. He vomited during the night, was confined to his bed several weeks and was never entirely well from that time until he died, January 5th, 1915, of pulmonary tuberculosis. Before the accident the deceased was in good health and had no indication of such disease. The attending physician in response to a hypothetical question, stated that it was his opinion the injuries were sufficient to cause the death of the deceased. A number of points have been urged in the briefs, but in the view we take of the case, it will be necessary to discuss but one of them.

In the declaration which consisted of two counts, it was alleged in each count, that at and prior to the time he was injured, the deceased was in the exercise of ordinary care for his own safety. We think it clear that the deceased knew of the dangerous condition of the ceiling, and there is no evidence that he did anything to avoid being injured. He could not expose himself to a known and obvious danger, as the evidence shows he did in the instant case by simply relying on the defendant's promise to repair without assuming the consequences of his own carelessness. Portions of the plaster had fallen from the ceiling about three weeks before the time the deceased was injured. The landlord's attention was called to it by the tenant. It was not repaired. As the evidence, therefore, shows that the deceased was not in

the exercise of ordinary care for his own safety, no recovery can be had. The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

WILLIAM PUMPHREY, a minor, by
Catherine Pumphrey, his next
friend,

Plaintiff in Error,

vs.

CHICAGO CITY RAILWAY COMPANY,
CHICAGO RAILWAYS COMPANY,
CALUMET RAILWAY COMPANY and
the SOUTHERN STREET RAILWAY,
(Corporations doing business
under the name and style of
CHICAGO SURFACE LINES),

Defendants in Error.

215 I.A. 642

ERROR TO

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE TAYLOR delivered the opinion of
the court.

On October 29, 1914, the plaintiff while walking
north crossing Archer avenue in the vicinity of Oakley
avenue, was struck by an eastbound street car belonging
to the defendants and seriously injured. He brought suit
and upon trial, at the close of the plaintiff's evidence,
the trial judge, pursuant to a motion, directed a verdict
for the defendants, and judgment having been entered there-
on in favor of the defendants this appeal was taken.

The sole question in the case is whether the
trial judge erred in not submitting the evidence to the
determination of the jury.

Archer avenue runs in a northeasterly and south-
westerly direction. Oakley avenue extends north from the
north side of Archer avenue. Blake street runs south from
Archer avenue. The junction of Oakley avenue with Archer
avenue on the north side of the latter street is 30 to 40

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feet west of the junction of Blake street on the south side of Archer avenue.

On October 29, 1914, a little after 9:00 o'clock in the evening the plaintiff, who was then about 18 years of age, having walked some distance southwest on the south side of Archer avenue and having crossed the end of Blake street, started when opposite Oakley avenue, to cross from the south to the north side of Archer avenue. The plaintiff had been walking in company with a friend, one Falconer. At about the time they reached the junction of Blake street and Archer avenue, or while they were crossing the end of Blake street, a westbound car came and passed them. When the plaintiff left Falconer, he started to cross Archer avenue, and, at a point about opposite the middle of Oakley avenue, the plaintiff walked on the westbound track and was struck by the eastbound car and very seriously injured. There was but one lamp lighting the general area and that was at the northwest corner of Oakley avenue and Archer avenue. The witness Elizabeth Anglin testified that, "it was a nice evening but was rather dark, that is all, dark, the street was awfully dark." The witness Kette testified that it was a very dark night and that it was very dark at that corner. The eastbound car was lighted and also its headlight. There were no lights in buildings at the corners of the streets that gave any light to the place in question. The speed of the eastbound car just prior to, and about the time of the accident was, according to the witness Falconer, from 24 to 25 miles an hour. The witness Novak testified that the eastbound car was coming fast. The witness Kitty Anglin testified that, "it looked to me as though it was going pretty fast." The witness Kette testified that it was "going very fast."

The witness Falconer testified that he did not hear any bell or warning given from the eastbound car. The witness Novak testified that "there was no gong sounded that night. I didn't hear no gong." The witness Kitty Anglin testified that she did not recollect hearing any bell or gong sounded or any warning of any kind before the collision; that she was "almost positive" that the bell on the eastbound car did not ring. The witness Elizabeth Anglin testified that she did not hear any bell ring. The witness Mette testified that he did not know whether the car going east rang its bell or not, that he paid no attention to it.

An analysis of the record shows that the evidence introduced by the plaintiff proved, or tended to prove, five important facts: (1) That at about the time that the plaintiff started to go north to cross the street a westbound car went by; (2) that the general area where the collision took place was dark and poorly lighted; (3) that the eastbound car which caused the injury was traveling at a rate of speed between 20 and 24 miles an hour; (4) that no gong or bell was sounded by the eastbound car; (5) that, at the time of the trial, as the result of the injury, the plaintiff's memory and judgment were impaired to such a degree that his testimony on the subject of whether or not he exercised ordinary care is of little, if any, value.

Of course, when the defendants made the motion that the jury be directed to find for them, "the court was bound to take the evidence for the plaintiff as true". (Krieger v. A.E. & C. R. R. Co., 242 Ill. 544) and, applying that principle to the circumstances in this case, and bearing in mind the evidence just recited, we are of the opinion that the question that arose was one of fact for the jury and not merely one of

law for the court. Chicago City Ry. Co. v. Nelson, 215 Ill. 436. In other words, we are not able to conclude that the jury would not be justified in inferring from the evidence of the circumstances at and about the time of the injury that the plaintiff was not in the exercise of ordinary care; and, further, we are unable to conclude that a jury would not be justified in holding that the defendants were guilty of wanton or willful negligence. Upon a motion to direct, it is a close case, and as we are not satisfied that all reasonable minds would conclude from the evidence that the plaintiff was guilty of negligence, we do not feel justified in refusing the plaintiff the right to have a jury pass upon the facts.

The judgment is therefore reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

163 - 24510

SAMUEL T. CHASE,

Appellant,

vs.

D. W. BERGEY,

Appellee.

215 I.A. 642
APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On December 1, 1917, the plaintiff brought suit against the defendant for the sum of \$100.48, for money loaned. The cause was tried before a jury and a verdict rendered that plaintiff take nothing by his suit. Judgment was entered upon the verdict, and from that judgment this appeal was taken.

The statement of claim recites that the plaintiff loaned to the defendant "upon the dates and in the amounts shown by the itemized statement" the sum of \$80.00; "that said loans, as evidenced by the four notes, were to bear interest at the rate of 6% per annum. That the total amount of said indebtedness, including interest at 6% per annum to return day, is \$100.48". Attached to the statement of claim are copies of four written instruments, the first of which is as follows:

Received of Samuel T. Chase, Gen'l Agt.,
Twenty andno/100 Dollars,
as a loan to be repaid by me with interest at
6%.
\$20.00

"8-15-1913
D. W. Bergey."

The three others were similar except that they were dated August 23rd, September 5th, and September 13th, respectively.

The defendant in his affidavit of merits denied that he borrowed the money of the plaintiff and alleged "that said moneys were paid to the defendant by said plaintiff as wages for work and labor and four weeks of time given by defendant in soliciting life insurance at the special instance and request of plaintiff * * * on condition, however, that if said defendant secured said life insurance successfully then and in that event only said defendant was to return the moneys advanced to him as wages by said plaintiff and that said services so rendered by defendant completely failed."

At the trial the plaintiff offered in evidence the four instruments - the signatures to which were admitted by the defendant to be genuine - and rested. Counsel for the defendant then moved the court to instruct the jury for the defendant. The trial judge overruled the motion and in doing so stated to counsel for the plaintiff that he "should go on and prove his case." Counsel for the plaintiff then called the defendant as a witness and examined him on the plaintiff's behalf. The testimony of the defendant, as a witness for the plaintiff is in substance, that through one Higman, a friend of his, he was introduced to Chase and had a conference with him with reference to going to work for some insurance company; that he told Chase, when asked on what basis he would go to work, that he thought he ought to have a regular salary of \$25.00 a week until he got used to the business; that Chase said "I will chance \$80.00 on you; I will give you \$20.00 a week for four weeks. That is all I can do and that is all I will do for you. You tell Mr. Higman."; that he then left Mr. Chase and told Higman that Chase had told

him he was to receive \$20.00 a week for four weeks; that he went to work and at the end of the first week told Higman he had not secured any insurance; that Higman said that was all right that might happen the first week; that Higman said "go to the window and the young lady will pay you;" that he went to the window and received \$20.00; that she made out a paper which he signed; that the next Saturday he returned and informed Higman that he had not been able to write any insurance; that he again drew \$20.00 and signed a paper similar to the first one; that the next week he did not work owing to illness; that the week afterwards he did work but did not succeed in writing any life insurance; that he again drew \$20.00 and signed a similar paper as before; that at the end of the fourth week he told Higman that he had concluded he was not a success in soliciting life insurance and so would quit; that Higman stated that he ought to keep on "until he had written some life insurance so that Mr. Chase would get some money back"; that for the last, the fourth week, he drew \$20.00 and signed a paper similar to the former ones and then quit.

On cross examination by his own counsel the defendant testified that "the installments were mere receipts and were not to be repaid unless sufficient commissions were earned to cover them. I have earned no commissions and consequently owed no money. After having this conference with Mr. Chase and Mr. Higman I went to the cashier's window, received the \$20.00 and signed the instruments in question. I did not read them; did not know what they contained until I received letters from Mr. Chase that I owed him the money."

It is contended by the plaintiff that inasmuch as his claim is founded upon written instruments, it was

error to admit parole evidence tending to vary their contents. The record, however, shows that the defendant was called by counsel for the plaintiff and examined at large, and in his direct testimony, purported to give a complete history of all his transactions with the plaintiff and that his testimony, together with the four instruments, themselves, is the only material evidence in the case. Of course, the cross examination of the defendant, which cross examination was conducted by his own counsel, was entirely proper and unobjectionable. Under the circumstances, therefore, the question arises, how may it now be contended for the plaintiff that the trial court erred in admitting the parole evidence, when, as a matter of fact, and according to the record, itself, that evidence was introduced by the plaintiff, himself? Admitting, it to be the law, that, as cited by counsel for the plaintiff, from the case of Walker v. Crawford, 26 Ill. 444; "It is an inflexible rule that the maker of a promissory note, absolute on its face, cannot show, as a defense thereto, even against the payee, an oral contemporaneous agreement which makes the note payable only on a contingency," still, we know of no rule or reason which prevents the court from taking cognizance of all the evidence which the plaintiff has seen fit to introduce; and if the plaintiff, in making out his case, has shown, voluntarily, as in the instant case, that the money, which was paid to the defendant by the plaintiff, was paid as wages and not as a loan, and that the instruments offered in evidence, which are in the form of promissory notes, were executed and delivered merely as receipts, it follows that no ground for recovery has been shown. Of course, it would be a very different situation if the defendant had been called in

his own behalf to testify in his own defense and had undertaken to put in such evidence. The record shows, however, that counsel for the plaintiff called the defendant to the stand and upon his direct examination, proved by him that he was employed by and worked for the plaintiff at \$20.00 a week for four weeks and was paid as wages \$80.00. Of course, in the face of that testimony, it cannot now reasonably be claimed by the plaintiff, as it is alleged in the statement of claim, that he "loaned" to the defendant the sum of \$80.00; the plaintiff's evidence not only fails to support the allegations of the statement of claim but confutes them.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

THESE ARE THE ONLY TWO CASES IN WHICH THE
COURT HAS DECIDED THAT A PARTY MAY
RECOVER DAMAGES FOR THE LOSS OF A
PARTY'S REPUTATION. IN THE FIRST CASE,
THE COURT HELD THAT A PARTY MAY
RECOVER DAMAGES FOR THE LOSS OF A
PARTY'S REPUTATION IF THE PARTY
CAN PROVE THAT THE LOSS OF THE
REPUTATION WAS CAUSED BY THE
DEFENDANT'S NEGLIGENCE. IN THE
SECOND CASE, THE COURT HELD THAT
A PARTY MAY RECOVER DAMAGES FOR
THE LOSS OF A PARTY'S REPUTATION
IF THE PARTY CAN PROVE THAT THE
LOSS OF THE REPUTATION WAS CAUSED
BY THE DEFENDANT'S NEGLIGENCE.

THESE ARE THE ONLY TWO CASES IN WHICH THE

COURT HAS DECIDED THAT A PARTY MAY

RECOVER DAMAGES FOR THE LOSS OF A

191 - 24538

ISABELLA SMITH,

Plaintiff in Error.

vs.

CITY OF CHICAGO,
a corporation,

Defendant in Error.)

215 I.A. 642

ERROR TO

SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On February 2, 1916, the plaintiff began an action of trespass on the case against the defendant. The ad damnum is \$15,000.00. The date of the injury is February 5, 1915. The defendant was served on February 3, 1916. On April 21, 1916, the plaintiff filed a declaration containing three counts. The first count alleges that the plaintiff by reason of the failure of the defendant to keep a certain subway, being part of North Robey street where it passed under the C. C. & St. L. Ry. Co. and the Northwestern P. & N. Company's railroad, in a safe condition, and by reason of the defendant allowing an accumulation of ice and water to remain in the subway, the plaintiff while walking in a northerly direction in and upon said subway or depressed portion of said North Robey street and, on account of the said accumulation of ice and water, unavoidably slipped and fell and was injured. It also alleges that the plaintiff notified the city on August 4, 1915, of her injury and of her intention to sue. The second count alleges negligence based

upon the failure of the defendant to fulfill its duty by properly draining the subway. The third count alleges negligence in failing to fulfill its duty in making proper drainage connections, as a result of which ice and water accumulated and caused the plaintiff to fall and be injured.

On April 29, 1916, the defendant filed a general and special demurrer to the declaration. On September 25, 1917, on motion of the plaintiff's attorney the cause was placed on the contested motion calendar for October 6, 1917, and on October 27th of the same year an order was entered reciting that the demurrer was sustained and leave given the plaintiff to file an amended declaration within five days.

On November 1, 1917, the plaintiff filed an amended declaration. It contains two counts. In the first count of the amended declaration the plaintiff alleged that the defendant entered into a contract with two certain railroads to elevate their tracks over North Robet street; that it was the duty of the defendant to restore the depressed street to a serviceable condition; that the defendant carelessly, negligently and wrongfully caused and allowed the said North Robey street to be left in an unsafe and dangerous condition by reason of which great quantities of ice and water accumulated, the result being that the plaintiff while walking on North Robey street, and in the exercise of due care, tripped and fell and was injured; further, that she caused notice of her injury and intention to sue to be served on the defendant.

The second count alleges that the defendant care-

lessly, wrongfully and negligently permitted great quantities of ice, snow and water to accumulate and remain in the said subway by reason of which the plaintiff, while walking in said subway and exercising due care, tripped and fell and was injured. It was also alleged that proper notice of the injury and intention to sue was given.

On November 12, 1917, the defendant filed a plea of the general issue and also a plea that the causes of action alleged in the amended declaration did not occur "within one year next before commencement of this suit in manner and form as the plaintiff has above complained against it the defendant; and this the defendant is ready to verify and prays judgment if the plaintiff ought to have aforesaid action against it, etc."

On January 12, 1918, the following order was entered:

"This cause coming on to be heard upon the defendant's plea of Statute of Limitation filed in said cause after arguments of counsel and due deliberation by the court said plea of Statute of Limitation is sustained and it is ordered that said cause be and is hereby dismissed at plaintiff's costs.

Therefore it is considered by the court that the plaintiff take nothing by her said suit and the defendant go hence without day and do have and recover of and from the plaintiff its costs and charges in this behalf expended and have execution therefor."

It is contended by the plaintiff that, having filed a plea of the general issue and the statute of limitations and, no issue having been taken on them, it was error for the court to proceed to a trial without a jury in the absence of an affirmative showing by the record that it was consented to, or that the parties against whom the judgment was entered, or her attorneys, were

the first of these is the fact that the system is not self-sufficient, and that it is necessary to import a large quantity of raw materials from abroad. This is due to the fact that the system is based on the use of a large number of different materials, and that these materials are not produced in sufficient quantities in the country.

The second of these is the fact that the system is not self-sufficient, and that it is necessary to import a large quantity of raw materials from abroad. This is due to the fact that the system is based on the use of a large number of different materials, and that these materials are not produced in sufficient quantities in the country.

The third of these is the fact that the system is not self-sufficient, and that it is necessary to import a large quantity of raw materials from abroad. This is due to the fact that the system is based on the use of a large number of different materials, and that these materials are not produced in sufficient quantities in the country.

THE END

The fourth of these is the fact that the system is not self-sufficient, and that it is necessary to import a large quantity of raw materials from abroad. This is due to the fact that the system is based on the use of a large number of different materials, and that these materials are not produced in sufficient quantities in the country.

The fifth of these is the fact that the system is not self-sufficient, and that it is necessary to import a large quantity of raw materials from abroad. This is due to the fact that the system is based on the use of a large number of different materials, and that these materials are not produced in sufficient quantities in the country.

present. No brief was filed by the appellee. Of course, it is the law that every reasonable presumption, not contrary to the record itself, may be made in order to support the judgment of the court. Thomas v. McGuinniss, 94 Ill. App. 248. In the latter case, pertinent to the subject here considered, the court said:

"In the case of Paul v. The People ex rel Gillen, 82 Ill. 82, the court held that where pleas had been filed, but no issue taken thereon, that it was error for the court to proceed to a trial without a jury in the absence of an affirmative showing by the record that it was consented to, or that the parties against whom the judgment was rendered, or their attorney, were present. This, we think, is the law, and is directly or indirectly sustained by the following authorities: Archer v. Spillman, 1 Scam. 553; Burgwin v. Babcock, 11 Ill. 28; Kelsey v. Lamb, 21 Ill. 559; Phillips v. Hood, 85 Ill. 451; Miller v. People, 156 Ill. 113; Seavey v. Rogers, 69 Ill. 534."

In the case of Paul v. People, (above quoted) the Supreme Court used the following language:

"Here seems to be a finding, and there is a judgment rendered, where the record presents no issue, either of law or fact, to be tried by the court or jury."

It may be claimed, however, that the order of January 12, 1918, which contains the words "after arguments of counsel" is some evidence that the plaintiff was represented and took part in the proceedings of the court. Still, we do not feel justified in making that deduction from the order of the court. Filing a plea of the statute of limitations and the general issue do not consummate an issue by the pleadings. No default was taken and no replication nor demurrer filed and there was no evidence of any order upon, or any affirmative action by the plaintiff or his attorney. Moreland v. Bebbler, 102 Ill. App. 572.

Under the circumstances we are of the opinion that it was manifest error to render this judgment on the record presented to us, and, therefore, it must be reversed and the cause remanded.

REVERSED AND REMANDED.

257 - 24608

D. B. FREDERWITZ,

Appellee,

vs.

TEMPERANCE BEVERAGE COMPANY,

Appellant.

215 I.A. 642

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE TAYLOR delivered the opinion of the court.

The pleadings in this cause are so involved, ambiguous and contradictory that it is exceedingly difficult to ascertain just what issue was presented to the trial court.

The original statement of claim dated March 22, 1917, on the part of the plaintiff "is for the sum of \$539.41 due from defendant to plaintiff upon an account stated between them on or about the 30th day of December 1916". On April 8, 1917, the defendant by its affidavit of merits denied that there was an account stated or that it owed the plaintiff the sum of \$539.41. On April 23, 1917, the plaintiff filed an amended statement of claim "for goods, wares and merchandise sold and delivered by plaintiff to defendant on or about December 30, 1916, said goods consisting of bottles and casks, and, as evidenced by the credit memorandum, sent by defendant to plaintiff on or about December 30, 1916, for the sum of \$536.41."

On May 18, 1917, the defendant filed an affidavit of merits alleging:

"that said plaintiff transacted business with this defendant for a period commencing January 5, 1916, and ending January 12, 1917; that during said period said defendant delivered to said plaintiff goods, wares and merchandise of the value of \$11,100.60 and that said plaintiff has been given credit for payments on account of said goods, wares and merchandise in the sum of \$10,990.62, leaving a balance due and owing from the plaintiff to the defendant in the sum of \$109.98; that said account shows as credit the item of \$539.41 under date of December 30, 1916. Said account is hereto attached showing in detail all the transactions between said plaintiff and said defendant, which said statement is marked "Exhibit A" and made a part hereof."

On June 21, 1917, defendant filed a statement of claim in the nature of a set-off as follows:

"for the sum of \$109.98 being the balance now due and owing to the defendant from the plaintiff on an account between the parties hereto resulting from business dealings had between the parties hereto during the period commencing January 5, 1916, and ending January 12, 1917; during which period aforesaid, said defendant delivered to said plaintiff, goods, wares and merchandise of the value of \$11,100.60 and that said plaintiff has been given credit on account of said goods, wares and merchandise the sum of \$10,990.62, leaving a balance due and owing from the plaintiff to the defendant the sum of \$109.98. Defendant states that the account aforesaid shows as credit the item of \$534.41 under date of December 30, 1916, which is the item set forth in the statement of claim heretofore filed in this cause by the plaintiff herein. Said account is hereto attached showing in detail all the transactions between said plaintiff and said defendants, which said statement is marked "Exhibit A" and made a part hereof."

On June 21, 1917, plaintiff filed an affidavit of merits as follows:

"Plaintiff denies that he is indebted to the defendant in the sum of \$109.98, or in any sum of money whatsoever, and states the fact to be that during the period commencing January 5th, 1916, and covering a period of about a year this plaintiff did have certain dealings with the said defendant and bought certain goods from the said defendant, and to plaintiff's best knowledge and belief bought the goods shown on defendant's statement of claim as Exhibit A and received the credits thereto with the exception of an item of September 7, being for 93 casks at \$7.00 or \$651.00, and as to that item plaintiff specifically denies that said item was sold and delivered to him by the defendant. Plaintiff further states that all of the items which he has bought from the defendant

of the items which he has bought from the defendant have been fully paid for and that defendant is indebted to him in the sum of \$593.41 as shown in the defendant's exhibit A under credits of December 30th."

And on December 20, 1917, the plaintiff filed an amended affidavit of merits to the defendant's set-off as follows:

"Plaintiff denies that he is indebted to the defendant in the sum of \$109.98, or in any sum of money whatsoever, and states the fact to be that during the periods mentioned in Exhibit A. of the defendant's statement of claim this plaintiff did have certain dealings with the said defendant and bought certain goods from the said defendant, but that each and every transaction was a separate and distinct transaction, and that any and all goods bought by the plaintiff from the defendant were paid for in full by the plaintiff in cash, and that plaintiff has no knowledge as to whether the dates and amounts set out in the said defendant's Exhibit A represent the correct dates and amounts, and, therefore, calls for strict proof thereof. As to the item of September 7th, 1916 being for 93 casks at \$7.00 amounting to \$651.00, the plaintiff specifically denies that said item was sold and delivered to him by the defendant and that he is liable therefor. Plaintiff further states that all of the items which he has bought from the defendant have been fully paid for, and that the defendant is indebted to him for \$539.41 as shown in defendant's Exhibit A under credits of December 30th, 1916."

In the course of the year 1916 the plaintiff purchased from the defendant certain car loads of temperance beverage in barrels and, from time to time, returned the casks and bottles, for which he received credit, and also remitted to the defendant certain checks in payment on the merchandise. The defendant in its affidavit of merits of May 18, 1917, set up that it had delivered to the plaintiff goods, wares and merchandise in the value of \$11100.60 and that the plaintiff had been given credit in the sum of \$10990.62, leaving a balance due the defendant of \$109.98. The defendant attached to its affidavit of merits the following statement:

Jan. 5	To Merchandise 1 Bbl. Rev.	\$7.65
15	1 Carload	1012.50
17	1 "	1014.60
22	1 "	1027.50
30	1 "	1012.50
July 11	1 "	1057.50
12	Ck Mts. Ret	600.00
24	" " "	600.00
28	1 Carload	1057.50
Aug. 2	Ck. Mts. Ret	442.35
18	" " "	32.50
23	" " "	989.00
29	1 Carload	1035.00
Sept. 7	Trans. Atlanta 93 Casks @ \$7	651.00
23	Ck. Mts. Ret.	561.00
		<hr/> 11,100.60

		<u>Credits.</u>
May 29	Cash	7.65
June 13	"	787.50
22	"	225.00
26	"	1014.60
July 8	"	1027.50
14	"	1012.50
18	Mts. Ret	651.41
Aug. 1	Cash	1057.50
17	"	1057.50
Oct. 5	"	1035.00
30	Mt. Ret	505.50
31	" "	364.00
"	" "	539.64
"	" "	865.91
Dec. 30	" "	539.41
1917		
Jan. 12	Salvage on 93 Casks returned to Atlanta	300.00
		<hr/> 10,990.62
		<hr/> 109.98

It will be observed that in the original statement of claim by the plaintiff the suit is upon an account stated; that in the amended statement of claim of April 23, 1917, the suit by the plaintiff is for goods, wares and merchandise sold and delivered to the defendant; that in the plaintiff's affidavit of merits dated June 30, 1917, the plaintiff denies that the goods, wares and merchandise, being the item of \$851.00, were sold and delivered to him; that in the plaintiff's amended affidavit of merits of December 20, 1917, "the plaintiff specifically denies that said item was sold and delivered to him by the defendant and that he is liable therefor."

Date	Time	Temperature		Wind	Direction	State
		Air	Water			
1891	10	72	72	10	SE	Clear
1891	11	72	72	10	SE	Clear
1891	12	72	72	10	SE	Clear
1891	13	72	72	10	SE	Clear
1891	14	72	72	10	SE	Clear
1891	15	72	72	10	SE	Clear
1891	16	72	72	10	SE	Clear
1891	17	72	72	10	SE	Clear
1891	18	72	72	10	SE	Clear
1891	19	72	72	10	SE	Clear
1891	20	72	72	10	SE	Clear
1891	21	72	72	10	SE	Clear
1891	22	72	72	10	SE	Clear
1891	23	72	72	10	SE	Clear
1891	24	72	72	10	SE	Clear
1891	25	72	72	10	SE	Clear
1891	26	72	72	10	SE	Clear
1891	27	72	72	10	SE	Clear
1891	28	72	72	10	SE	Clear
1891	29	72	72	10	SE	Clear
1891	30	72	72	10	SE	Clear

Date	Time	Temperature		Wind	Direction	State
		Air	Water			
1891	10	72	72	10	SE	Clear
1891	11	72	72	10	SE	Clear
1891	12	72	72	10	SE	Clear
1891	13	72	72	10	SE	Clear
1891	14	72	72	10	SE	Clear
1891	15	72	72	10	SE	Clear
1891	16	72	72	10	SE	Clear
1891	17	72	72	10	SE	Clear
1891	18	72	72	10	SE	Clear
1891	19	72	72	10	SE	Clear
1891	20	72	72	10	SE	Clear
1891	21	72	72	10	SE	Clear
1891	22	72	72	10	SE	Clear
1891	23	72	72	10	SE	Clear
1891	24	72	72	10	SE	Clear
1891	25	72	72	10	SE	Clear
1891	26	72	72	10	SE	Clear
1891	27	72	72	10	SE	Clear
1891	28	72	72	10	SE	Clear
1891	29	72	72	10	SE	Clear
1891	30	72	72	10	SE	Clear

The first of these is the fact that the temperature of the air and water is the same. This is due to the fact that the air and water are in contact with each other, and the heat is transferred from the air to the water. The second fact is that the wind is from the southeast. This is due to the fact that the wind is blowing from the southeast, and the air is being heated by the sun. The third fact is that the state is clear. This is due to the fact that the sky is clear, and there are no clouds.

It will be seen, therefore, that the plaintiff first sued on an account stated then changed his cause of action and sued for goods, wares and merchandise sold and delivered, and then, in his affidavit of merits to the set-off, denies that the goods, wares and merchandise were ever purchased by him.

The trial judge evidently tried the case on the theory that the suit was for money had and received and not for merchandise sold nor upon an account stated.

The actual dispute between the parties regardless of whatever issue may have been precipitated by the pleadings, is whether the plaintiff purchased, sometime in September, 1916, from the defendant company 93 casks of beverage at \$7.00 per cask. All the evidence is contained in three depositions, being those of the plaintiff, Federwitz, who testified for himself, and Steinneu and Bigler who testified for the defendant. Federwitz testified that some time the latter part of August, 1916, Steinneu, who represented the defendant, called to see him and stated that he had sold a car load of beverage to one Bigler of Atlanta but that there was no market in Atlanta for the sale of the goods; that he asked the plaintiff to help Bigler in disposing of the shipment; that he told Steinneu that if he could do anything for Bigler he would and to have him ship the car load in question to him, the plaintiff; that the car arrived in due season and he attempted to dispose of it for Bigler, but finding himself unable to do so he reshipped the car to Bigler at Atlanta; that on December 30, 1916, he received from the defendant a credit memorandum as follows:

"CREDIT MEMORANDUM
TEMPERANCE BEVERAGE COMPANY,
CHICAGO.

12/30/16.

To D. B. Federwitz,
Savannah, Ga.

1701 3/12 Doz Small Bottles @ 25¢	\$426.91
114 Cases @ 75¢	85.50
54 Casks usable @ 50¢	27.00
119 Casks unusable, no credit	
	<hr/> \$539.41

Our #220029"

The witness Steinneu testified that he was an agent for the defendant and that in September, 1916, he saw the plaintiff; that he told him, the plaintiff, the defendant had 93 casks in Atlanta which could be shipped to him, the plaintiff, if he desired; that the defendant would sell it to him at \$7.00 per cask delivered in Savannah; that the plaintiff said as he was liable to run short owing to a probable railroad strike he would like to have it; that he was a little short of funds; and that he, the witness, told him the defendant would give him 30 days; that the plaintiff said he would accept the proposition; that he, the witness, called up Bigler over the long distance telephone from the plaintiff's office and authorized Bigler to ship the 93 casks that day to the plaintiff at Savannah; that the next he heard of the transaction the plaintiff had returned the 93 casks to Atlanta; that when he learned from Bigler that the 93 casks had been returned he expressed his surprise to the plaintiff and wanted to know what disposition was to be made of it; that the latter said he could not sell it; that he did not want to beat the defendant out of the money for it; that subsequently the defendant sold the 93 casks for \$300.00, which amount was credited on the plaintiff's account. The witness Bigler testified that on September 1, 1916, Steinneu telephoned him from Savannah, Georgia to ship 93 casks of Budd to the plaintiff at Savannah; that,

accordingly, he shipped the 93 casks to the plaintiff at Savannah; that in doing so he was acting for the defendant upon the instructions of Steinneu; that on November 3, 1916, he received notice that the 93 casks of Budd had been shipped back to him by the plaintiff.

As all of the evidence is contained in the depositions and exhibits, we are in as good a position as the trial judge to determine the credibility of the various witnesses. The testimony of Steinneu, also that of Bigler, directly contradicts that of the plaintiff; according to them, the 93 casks were actually purchased outright by the plaintiff. He denies it, but his denial is not sufficient in our opinion to overcome the evidence against it. The credit memorandum of December 30, 1916, is not inconsistent with the position of the defendant, that the 93 casks were actually sold by the defendant to the plaintiff for \$651.00. The defendant, according to the statement offered in evidence, charged the plaintiff, as of September 7, 1916, with \$651.00 for 93 casks and then credited him with \$300.00 as the salvage on that merchandise.

We are of the opinion, considering all the evidence, that the plaintiff failed to make out his case. As to the set off claimed by the defendant, inasmuch as the statement which was offered in evidence is merely an ex parte statement and is nowhere shown to have been ratified and sanctioned in full by the plaintiff, it cannot be allowed. The judgment will be reversed.

REVERSED.

338 - 24689

MAX EISEN,

Appellant,

vs.

MAX KORNREICH and
JACOB RUBENFELD,

Appellees.

215 I.A. 643

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE TAYLOR delivered the opinion
of the court.

This is an appeal from an order denying a
motion to revive a judgment.

On October 22, 1910, the plaintiff recovered
judgment for \$500.00 in an action of trespass on the
case against the defendants, and on October 23, 1917,
pursuant to a motion made on behalf of the plaintiff
a scire facias was ordered issued to revive that judg-
ment. On October 3, 1917, the writ of scire facias
was issued by the Clerk of the Circuit Court and duly
served upon the defendants. On February 26, 1918,
the defendants filed a plea setting up,

"that the said Max Kornreich, after the re-
covery of the judgment aforesaid, and before
issuing of his said writ, to-wit: on or about
the 15th day of December, 1911, the said Max
Kornreich paid to the said plaintiff, Max
Eisen, one (1) gold watch and chain, in full
satisfaction and discharge of the said judg-
ment, and this the defendants are ready to
verify; wherefore they pray judgment if the
said Max Eisen ought to have his execution
and revival aforesaid, etc."

On March 18, 1918, the plaintiff filed a replica-
tion reciting:

1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 2680, 26

94 11212

1917

1. The first group of people who are interested in the study of the history of the United States are the people who are interested in the history of the United States.

1901

"that the defendant Max Kornreich did not after the recovery of the judgment in above cause and before issuing of his said writ, to-wit: on or about the 15th day of December, 1911, pay to the said plaintiff one (1) gold watch and chain in full satisfaction and discharge of said judgment nor did he, the plaintiff, then and there or at any time accept and receive of and from the defendants, or either of them, anything in full nor in part satisfaction and discharge of the said grievances as the defendants in their said plea have alleged."

By agreement the cause was tried before the trial judge without a jury. The only issue presented by the plea of the defendant is whether "the said Max Kornreich paid to the said plaintiff, Max Eisen, one (1) gold watch and chain, in full satisfaction and discharge of the said judgment." That is the only defense set up by the defendants and it is denied by the replication of the plaintiff. It was admitted by counsel for all parties that a judgment was entered in the case of Eisen v. Rubenfeld, No. 269157, in the Circuit Court for \$500.00, and that nothing has been paid thereon.

Only one witness, Joseph Kohn, an attorney, was called. He testified that in November, 1911, he had a conversation with Kornreich who said he could not pay anything on the judgment; that he would help him, the witness, collect the judgment; that he knew the other defendant had some property which was in somebody else's name. Kohn further testified that on that occasion he told him that the judgment had been assigned to him but that if he would let him know where the property was located and in whose name it was he would take the necessary proceedings to try and collect the money from the other defendant; that Kornreich said he would. There was offered in evidence a written assignment of the judgment by Max Eisen to Joseph Kohn. The assignment was made to Kohn in 1911,

1914-1915
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and recorded November 16th, 1917. On cross examination Kohn was asked whether Eisen had told him he had signed a satisfaction for the judgment. The question was not answered and, while it was pending, the trial judge asked: "Where is this paper Eisen signed?" upon which counsel for the plaintiff objected on the ground that it was not cross examination. That, however, the court overruled and the witness answered, "Mr. Eisen was to get \$500.00 if he signed it and he did not get it." There was some further colloquy but no further evidence of the signature. Counsel for the plaintiff insisted that, at the time of the execution of the alleged satisfaction piece, the judgment had already been assigned, and argued, further, that not only did the defendants know of the assignment but that nothing was ever paid on the judgment. Counsel for the plaintiff offered to prove that there was no consideration for the alleged satisfaction piece; that it was obtained by fraud, and that no gold watch and chain was received and accepted in satisfaction and discharge of the judgment, and that the circumstances, under which the alleged satisfaction piece was executed, show that it was obtained by fraud. The trial judge denied the request of the counsel for the plaintiffs and stating, "I think the satisfaction is a bar to your action," overruled the motion to revive the judgment.

We are of the opinion that this cause must be sent back for a new trial. Inasmuch as the defendants claim that there has been executed for their benefit a written satisfaction of the judgment, the plaintiff was undoubtedly entitled to put in proof on that subject, and, further, to show whether it was obtained by fraud,

whether it was without consideration and whether its execution was subsequent to the assignment of the judgment to the plaintiff with notice to the defendants. If the defendants fail to show what they pleaded; that they gave a watch and chain for the satisfaction of the judgment, and if the plaintiff proved that the alleged satisfaction piece was never executed or was a fraud or was executed after the judgment was assigned to the plaintiff, with notice to the defendants, then the plaintiff would be entitled to his motion and the issuance of an execution.

Owing to the errors referred to, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

WARNER CONSTRUCTION COMPANY,
a corporation,
Plaintiff in Error,
vs.
MIDLAND TERRA COTTA COMPANY,
a corporation,
Defendant in Error.

215 I.A. 643

ERROR TO SUPERIOR COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE MCHURELY
DELIVERED THE OPINION OF THE COURT.

This case is before us on writ of error sued out by the Warner Construction Company, plaintiff below, the suit having been brought for reimbursement of money paid by plaintiff under the Workmen's Compensation Act of Illinois on account of the death of Frank Rush, an employe; it was claimed that the accident wherein Rush sustained the fatal injuries was caused by the negligence of employes of the Midland Terra Cotta Company, defendant.

The action was one of trespass on the case. The declaration alleged substantially that on October 2, 1914, the plaintiff and defendant were working upon and about a certain building in the course of construction in the City of Chicago; that a certain Frank Rush was working for the plaintiff, under and about a certain scaffold, erected by plaintiff and constructed in a good and workmanlike manner, near one of the walls of said building; that defendant and its servants knew, or should have known, that he, Rush, in the course of his employment, was working under, around and beneath said scaffold; that it was the duty of the defendant to conduct itself in a careful and prudent manner for the safety of the plaintiff and its servant, said deceased; that defendant, disregarding its said duty, negligently and

carelessly weakened, cut away and sawed out and caused to be weakened the support of said scaffold, whereby it, together with the materials and workmen thereon, fell upon the deceased; that plaintiff and deceased were then and there in the exercise of reasonable care; that by reason of said negligent acts of defendant, said Frank Rush was severely injured, wherefrom he died on or about October 3, 1914.

The accident occurred on the date alleged, at the Lake View Pumping Station, then in course of construction for the City of Chicago. The Warner Company was the general contractor, and the Midland Company was a sub-contractor for the laying of certain terra cotta work in and about the building, and in the course of its operations used the scaffolding erected by the plaintiff. The accident resulted by reason of a collapse of part of a scaffold, which precipitated to the floors below materials that had been placed thereon, and Frank Rush, who was working in the basement, was struck by some of these materials and sustained fatal injuries.

The entire scaffolding used in the work was constructed and maintained by the Warner Company. The room in question was about 50 feet wide by 150 feet long, the walls rising to a height of approximately 60 feet. The scaffold which collapsed was built along the west wall of the room. There were really two scaffolds along this wall, one rising above the other. The top scaffold rested upon steel beams which projected about 10 feet out from the west wall at a height of about 25 feet from the first floor and were to be used as a base for the construction of a gallery. Planks were laid across the beams, and a scaffold built upon the planks. This scaffold was about 6 or 7 feet in width, and at about every six feet of its length rested upon cross pieces. The planks used

for the top flooring of this scaffold were 14 to 16 feet in length, and on such floor, in two or three irregular piles, were some 350 bricks and other material, which fell when, it is alleged, the scaffold collapsed by the breaking or giving away of one of the cross pieces upon which the planks of this top floor rested.

It would appear that there had been an understanding between the foremen of the respective companies that any change or alteration in the scaffolding for the convenience of the terra cotta workers was not to be attempted by the employees of the Midland Company without first notifying the foreman of the Warner Company, and there was evidence to the effect that at different times the latter foreman had ordered the scaffolding changed at the request of the Midland foreman.

August Buktanica, a carpenter in the employ of plaintiff, who with Rush constructed the scaffolding, testified that about an hour before the accident he went up on the scaffold for his saw, which he found lying alongside where the terra cotta men were working, and that its handle was broken; he noticed then that the inside plank had been torn off and that the upright and cross piece had been sawed inside along the wall. Ursic, a bricklayer, testified that half an hour prior to the collapse he was on the platform, 20 to 30 feet away from the section that went down; that he observed the terra cotta men at work, saw them move a plank which was close to the wall, and also witnessed them sawing some part of the scaffold. There was further evidence tending to show that before this sawing took place the scaffold was secure, with nothing broken. After it fell one of the cross pieces was found split in two, a part of it still hanging on one of the uprights, and a piece had been sawn

out of both the upright and the cross piece; this cutting extended downward about 13 inches, in an "L" shape out of the upright, and cutting off the end of the cross piece, leaving only two inches holding it to the upright. From this and other evidence plaintiff urged the conclusion that the collapse ~~was~~^{who} caused by the servants of the defendant, for the purpose of more conveniently handling the terra cotta which they were laying had sawed away part of the supports of the scaffold, which so weakened it as to cause it to collapse.

At the close of plaintiff's case the trial court instructed the jury to return a verdict for the defendant, which was done and judgment of nil capiat entered. We hold that the evidence adduced should have been submitted to the jury. Without passing upon its weight or conclusiveness, we are of the opinion that the evidence reasonably tended to support the allegations of plaintiff's declaration. If the jury believed the testimony of plaintiff's witnesses as to the fact and location of the sawing of the parts of the scaffold, we see no reason why it should not have been permitted to use its judgment as to whether this caused the collapse. It would seem to be fairly clear, if the supporting timbers of the scaffold were sawed as described, that it would weaken its strength. Plaintiff was not bound to demonstrate the cause of the collapse to a mathematical molecular certainty. If there is any evidence in the record fairly tending to support the case made by either party, it is the duty of the trial court to allow the jury to pass on all controverted questions of fact. Burger v. St. Louis Bed & Mfg. Co., 206 Ill. App. 256, and cases cited. And, as held in Bailey v. Robison, 233 Ill. 614, it is not enough, to justify the granting of a motion for a directed verdict, that the trial court may be

of the opinion that a verdict against the moving party would have to be set aside.

For the failure of the trial court to leave to the jury the determination of the question of negligence upon the evidence submitted in this case, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

107 - 24965

ELSPETH M. CONNER,
Defendant in Error,

vs.

BORLAND-GRANNIS CO.,
a corporation,
Plaintiff in Error.

2151.A. 643

ERROR TO SUPERIOR COURT,

COCKE COUNTY.

MR. PRESIDING JUSTICE MCSURELY

DELIVERED THE OPINION OF THE COURT.

By this writ of error defendant seeks to have reversed a judgment entered against it upon verdict for \$1,850.

Plaintiff's declaration consisted of the common counts, and plaintiff claimed upon the rescission of a contract of purchase of an electric automobile, on the ground that the machine delivered was defective and not in accordance with the contract of purchase. The testimony tended to show that the contract price was \$3,100; that plaintiff traded in as part of the purchase price a second hand electric automobile at an agreed value of \$1,200, and also paid \$250 in cash, and for the balance gave a series of notes, one falling due every thirty days, secured by a chattel mortgage dated June 26, 1913. The new car was delivered to the plaintiff on or about June 23, 1913. At the time of this delivery she verbally complained that the upholstering on the ceiling was cloth instead of leather, but according to her own testimony she accepted the car with the cloth ceiling. There was some evidence concerning the varnish finish, but nothing very definite and nothing to show that this finish, if defective in any way, was not in the same condition and easily observed at the time of delivery. The main point of complaint seems to have been concerning an alleged defect in the brakes which would cause the car on occasions to stop, and made it difficult for the

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plaintiff to release the brakes and start the car again. There was no proof that the stopping of the car was caused by any defect. There is virtually no contradiction of the witnesses who testified as to the mechanism of the brakes; that there was attached a safety device which automatically cut off the electric current when the brakes were set; that these were kept set by a ratchet which had to be released by a button, and that it was then necessary to bring the controller handle back into neutral before the car could be started. There were also other devices having a proper purpose. It is a reasonably clear conclusion that it was plaintiff's lack of experience in handling the brakes which caused the car to stop, rather than any defect.

Plaintiff is a physician, and it was established by the evidence that from the time of the delivery of the car to her on or about June 23rd, she drove it in making her professional calls continuously up to October 22nd. It also appears that at this last mentioned date possession of the car was taken by the defendant under the chattel mortgage for failure of the plaintiff to pay the note which fell due in October; that the prior notes were paid as they fell due, with full knowledge of all claimed defects, and that no attempt to rescind the purchase was made until after the car was taken under the chattel mortgage, when she wrote under date of October 24th a formal notice attempting to rescind the sale.

At the conclusion of all the evidence defendant moved the court to instruct the jury to bring in a verdict in its favor, which motion the court denied, and this is asserted as error. The rule is stated in Benjamin on Sales, vol. 2, sec. 1356 (4th Am. Ed.):

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"The buyer will also lose his right of returning goods delivered to him under a warranty of quality, if he has shown by his conduct an acceptance of them, or if he has retained them a longer time than was reasonable for a trial, or has consumed more than was necessary for testing them, or has exercised acts of ownership as by offering to resell them; all of which acts show an agreement to accept the goods, but do not constitute an abandonment of his remedy by cross-action or by counter-claim in the vendor's action for the price."

In Underwood v. Wolf, 131 Ill. 425, it was held that if the purchaser desired to rescind the contract and return the goods he must offer them back as soon as he discovers the breach, or after he has had a reasonable time for examination; and that the right to rescind and return is waived by retaining and continuing to use the goods longer than was necessary for a trial; that under such circumstances the purchaser may have recourse for damages, if any, in a suit for breach of warranty, or rely upon damages for such breach in reduction of the contract price. This rule has been uniformly held in this state. Wolf Co. v. Monarch Refrigerating Co., 252 Ill. 491; Woodford Dist. Co. v. Remington Typewriter Co., 174 Ill. App. 244; Electric Vehicle Co. v. Price, 138 Ill. App. 594; Hakes v. Aaron, 182 Ill. App. 100, and others.

Applying this rule to the facts before us we are of the opinion that the plaintiff, by her conduct in retaining and continuing to use the car as she did, and by her payment of the notes secured by the chattel mortgage as they fell due, waived her right to rescind, and that the trial court should have directed the jury as asked for by the defendant.

For the error indicated the judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

ANDREW SARNA, by Mary Sarna
and Oliver F. Roberts, his
guardians and next friends,
Defendant in Error.

vs.

THE BALTIMORE & OHIO RAILROAD
COMPANY, a corporation, and THE
BALTIMORE & OHIO CHICAGO TERMINAL
RAILROAD COMPANY, a corporation,
Plaintiffs in Error.

215 I.A. 643

ERROR TO SUPERIOR COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE MCGURELY
DELIVERED THE OPINION OF THE COURT.

On February 15, 1916, Andrew Sarna, hereinafter called plaintiff, then twelve years of age, was struck by a freight train operated by the Baltimore & Ohio Railroad Company on the tracks of the Baltimore & Ohio Chicago Terminal Railroad Company. He brought suit for damages on account of the injuries received, and upon trial had judgment for \$15,000 which the defendants say should be reversed.

47th place is an east and west street in Chicago, and at the place where the accident happened is intersected by eleven railroad tracks running north and south. Plaintiff was crossing the tracks, going west, and defendants suggest in their first brief that there is no proof that 47th place at this point was a public crossing, and that the court erred in refusing to instruct the jury to this effect. Whether or not there was a public crossing at this point was a question of fact properly submitted to the jury, and under the evidence the jury was warranted in concluding that it was a public crossing. There was testimony tending to show that people regularly used that crossing, that there were no gates or anything to prevent them, that the street was open on both sides of the tracks, and that "people crossed right along."

From the stories of the witnesses, both for the plain-

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tiff and the defendants, the jury properly could believe that about five o'clock in the evening plaintiff came along 47th place from the east to the railroad tracks, intending to cross; that he had crossed three of the tracks when he saw a freight train, drawn by a B. & O. engine, coming from the north on the fourth track; it was composed of about forty cars; that he stood east of this track waiting for the train to pass, and was about four feet from the cars as they went by; that the rear end of the next to the last car was damaged. Some of the witnesses described it as crushed and broken, and that the cross-pieces on the ladder running to the top were sticking out. Another witness described the car as "smashed from the top"; that the roof was crushed out, causing the car to bulge; that sticking straight out from the side of the broken car was a rod or bar. One witness testified that this stuck out two or three feet from the side of the car, while another witness estimated it as sticking out four or five feet. There is unanimity in the testimony that this bar caught the plaintiff by the coat, dragging him a few feet, then throwing him to the ground, with one of his legs under the wheels, which severed it.

The credibility of plaintiff's witnesses is earnestly attacked, but giving full allowance to all differences and inconsistencies, if the jury saw fit to give credence to the essential facts as narrated, we cannot say that the record would justify this court in holding that the jury was not warranted in so doing.

No occurrence witnesses testified on behalf of the defendants. An attempt was made to show that no such train as described by the witnesses for the plaintiff had passed over the track in question at the time of the accident. This track was known as a joint track of the Pennsylvania Railroad and the B. & O.

Chicago Terminal. It commenced at 39th street and ran south to near 49th street, where it connected with the P. & O. C. T. main tracks which were next on the west; near 43rd street it had a connection with the Stock Yards. At 49th street, where the joint track ran into the main line, was a switch tower; from this the numbers of all cars and engines moving from this joint track onto the main line at this point were telephoned to the train dispatcher's office. The train dispatcher produced his records of such trains, showing that on the evening of the accident, from four o'clock until midnight, there was only one such train; that this came onto the main track at 5:14 p. m. This evidence was supplemented by that of the car inspectors, who testified as to this train, giving evidence tending to show that it contained no car which was in the damaged condition described by plaintiff's witnesses.

If it could be assumed as unquestionable that the train described by the railroad men was the same that injured the plaintiff, the truthfulness of the stories of plaintiff's witnesses would be open to serious doubt. We are of the opinion, however, that there was sufficient evidence for the jury to conclude that the witnesses for the plaintiff on the one hand, and those for the defendants on the other, were testifying as to different trains. No one testified that the train carrying the car which injured plaintiff went out from the joint track onto the main track at 49th street, while there is evidence that there was a constant movement of trains back and forth for various purposes upon the joint track, which do not go upon the main track, of which no record is kept. There is, therefore, no necessary conflict in the evidence, and the conclusion of the jury as to the facts of the occurrence will not be disturbed.

Defendants urge that a peremptory instruction in

their favor should have been given under the authority of Q. & A. I. R. R. Co. v. Reilly, 212 Ill. 506, and the same case reported in 167 Ill. App. 231, and 255 Ill. 294. That case, and others cited, concern a situation unlike that presented now. In the Reilly case, plaintiff was struck by a piece of timber projecting from a load carried on the car. Plaintiff there sought to recover upon the allegations that the car was negligently loaded so that the piece of timber projected, and also that the train was so operated that the piece came to project, and that defendant knew of its dangerous position. The courts held that the mere fact of the projection did not tend to prove either of these allegations; that the rule of res ipsa loquitur did not apply, and there was no evidence as to how the lumber was originally loaded, and even if the train was so operated as to cause the piece to project, it did not appear that it had been so long projecting that the defendant should have known it. In the present case the substance of plaintiff's first count is that it was negligence to haul the car in question in its damaged condition, with a rod or bar projecting from the side. This does not involve any question as to how the car came into this condition. Plaintiff is not concerned with this. In this respect decisions concerning improper loading are not in point.

As to the suggestion that there is no evidence as to how long the car in question had been in its damaged condition, so as to charge the defendants with knowledge, it is sufficient to say that if it was in the badly damaged condition described by the witnesses, defendants would be presumed to see this when the train was first made up; if it occurred after the train was made up, it could only have been caused by so violent an accident as to attract the immediate attention of the train crew. It would seem clearly to be negligence to haul a train containing a car so wrecked or damaged as to cause broken parts to project so far beyond the ordinary

The first part of the paper is devoted to a discussion of the
 various methods which have been proposed for the determination of
 the rate of reaction in a system in which the reaction is
 reversible. It is shown that the method of initial rates is
 the most reliable, and that the method of half-times is only
 applicable to a limited class of reactions. The method of
 integrated rate equations is also discussed, and it is shown
 that it can be used to determine the order of reaction and
 the rate constant. The method of continuous variation is
 also discussed, and it is shown that it can be used to
 determine the stoichiometry of a reaction. The method of
 differential rate equations is also discussed, and it is shown
 that it can be used to determine the rate constant and the
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 light-jump is also discussed, and it is shown that it can be
 used to determine the rate constant and the order of reaction.

width of the car as to endanger persons legitimately standing nearby within the usual and customary safety zone. It was not error for the trial court to refuse the peremptory instruction and to leave to the jury the question of whether under the conditions present the evidence supported plaintiff's allegations.

It is strongly argued that it was reversible error for the court to give at plaintiff's request instruction No. 5, which is as follows:

"If the jury believe from the evidence that the plaintiff, Andrew Sarna, was in the exercise of ordinary care for a child of his age, intelligence, capacity, discretion, and experience, for his own safety, and was injured by the negligence of the defendants, as charged in the declaration, then the jury should find the defendants guilty."

The particular point of the attack is upon the word "was" in the second line. It is true that plaintiff seems to have courted trouble and jeopardized his case by using the word "was" in this connection instead of the stereotyped and approved word "while." It is said that by the use of the word "was" the exercise of ordinary care is not connected with the accident, either as to time or circumstances. While this instruction is fairly open to such criticism, we do not think that under the circumstances of this case the giving of this instruction in this form requires a reversal. There was no controversy in the evidence as to the conduct of plaintiff at any time during the occurrence, so that the jury would properly understand the instruction to refer to the continuous conduct of the plaintiff both before and at the instant of the accident. Furthermore, the instruction may be read as referring to "the exercise of ordinary care * * as charged in the declaration;" and the averment of the declaration as to plaintiff's care has reference to his conduct while "crossing the said railroad on

the said 47th place.* This would include his continuous essential conduct.

For the reasons above indicated the judgment is affirmed.

AFFIRMED.

215 I.A. 644

ANNA L. SEARS,
Appellee,

vs.

ALEX. SCHWARTZ,
Appellant.

APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE McSHERLY

DELIVERED THE OPINION OF THE COURT.

This is a suit for rent of store at 33 North Dearborn street. The lease involved was executed in December, 1914, by the plaintiff, Anna L. Sears, and one Samuel Rothschild. The latter conducted a lunch room on the premises until April 27, 1917, when, with the consent of the lessor, he assigned the lease to the defendant, Schwartz, who took immediate possession and continued in the business until about the 6th of August, 1918. In accepting the assignment Schwartz assumed and agreed to abide by all the covenants, conditions and obligations of the lessee under the lease.

On August 5, 1918, considerably more than a year after defendant took possession, the chief sanitary inspector of the City of Chicago notified him as follows:

"Respecting the restaurant operated by you in the basement at 33 North Dearborn street, I have to advise you that for some time the department has been endeavoring to cure the very serious condition resulting from your restaurant being overrun with cockroaches and swarms of mosquitoes."

By the second paragraph of the lease it is provided

"That no promises or representations, except such as are endorsed herein, have been made to the lessee by lessor or any of lessor's representatives or agents respecting the condition of said premises, or the making at cost of the lessor of repairs, alterations and improvements or additions of any nature in said premises, and the taking of possession of said premises by the lessee shall be conclusive evidence as against the lessee that said premises were in good and satisfactory condition when possession of the same was so taken, and lessee will keep said premises and appurtenances, including all water, waste, sewer and other pipes and plumb-

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ing and all sidewalks, catch basins, vaults and roof in good repair and in a clean and healthful condition and in accordance with the City Ordinances and the direction of the proper public officers during the term of this lease, without expense to lessor. * * And the lessor shall not be liable for any damage to said personal property, to said premises or to said lessee or to other persons or property caused by water, electricity, steam, sewerage, illuminating gas, sewerage gas or odors or by any acts or neglect of other tenants, occupants or the employes of the building, or any other person, or caused in any other manner whatsoever."

Defendant gave up possession August 6, 1918, with rent unpaid for the months of May, June and July, amounting to \$750, suit for which was commenced July 18th. In due course three affidavits of merits were filed, all of which on motion of plaintiff were successively stricken from the files, the last on November 8, 1918, and defendant electing to stand by the same, judgment was entered for the amount claimed. From this defendant appeals.

The affidavit of merits last referred to, in substance denied that there was any rent due as claimed; alleged that some time during April, 1918, defendant was notified by the department of health of the City of Chicago that the premises occupied by him would have to be vacated on account of the unsanitary condition existing therein, whereupon he took the matter up with one Magill, agent for the plaintiff, who informed him that he, the defendant, would not be called upon to pay rent until such time as the premises should be put in a condition agreeable to the department of health; that upon this representation the defendant remained in the premises until the 6th of August, 1918, when he was ordered by the department of health to vacate immediately; further, that the said agent of plaintiff repeatedly assured him that he would put the premises in condition so that defendant would be able to continue the business, and that he would have to pay no rent until the roaches and swarms of mosquitoes had been removed; also that defendant had suffered great damages by reason of the failure of the lessor to put said premises in the

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condition required, far in excess of the amount claimed by plaintiff, and proposed in defense of said suit to recoup himself for said damages.

We hold that the action of the trial court in striking defendant's affidavit of merits from the files was proper. By the lease the lessee specifically covenanted to keep the premises in good repair and in a clean and healthful condition without expense to the lessor, and that the latter should not be liable for any damages to the premises, or to the lessee, caused by water, electricity, steam, sewerage, sewer gas, odors, etc., "or caused in any manner whatsoever." Defendant in his brief here filed evidently proceeds upon the theory that the trouble he complains of originated on premises adjoining the restaurant, and over which he had no right of supervision. A reading of the notice sent out by the city authorities makes it clear that the troublesome spots were under the sidewalk in front of the premises, and beneath the floor of the room occupied by defendant. The part of the lease above set out contains covenants making it incumbent upon the tenant to keep said premises and appurtenances, including sidewalks, catch basins, vaults, etc., in good repair and in a clean and healthful condition. Furthermore, the alleged representations of the lessor's agent could not be introduced to vary the terms of the written instrument under seal.

What is stated by defendant to be an order by the department of health to vacate, was as a matter of fact a warning that conditions would have to be improved or the closing of his place of business would be recommended.

Applicable to the situation before us in the language of the court in Higbie v. Weagham Co., 126 Ill. App. 97:

"If it be conceded that the evidence contained in the record tends to establish the breaches of the covenants of the lease, as contended by appellants (as to which we express no opinion), and that these breaches amount to a constructive eviction, the conceded fact remains that appellants voluntarily occupied the premises described in the lease during the months of September, October and November, 1904, during which the rent of the premises accrued for which the judgment was entered, and appellants cannot be heard to say that no rent is due for those months."

It follows from what has been said that there could be established by plaintiff no foundation upon which to base his alleged claim of recoupment.

The judgment of the Municipal court is affirmed.

AFFIRMED.

179 - 25086

215 I.A. 644

SECURITY ASSURANCE COMPANY,

Appellee,

vs.

E. WUSHINA,

Appellant.

) Appeal from

) Municipal Court

) of Chicago.

MR. JUSTICE J. M. ROBERTS
DELIVERED THE OPINION OF THE COURT.

Defendant by this appeal seeks to have reversed a judgment against him for \$290.35, entered in a suit brought upon a promissory note dated August 8, 1916, made by one H. E. Cobb to the order of E. Wushina, and duly endorsed by the defendant.

The evidence shows that this note was sold by the defendant to the plaintiff before maturity; that when it fell due on December 8, 1916, it was presented both to the maker and the endorsing defendant, and the latter promised to pay if Cobb did not. On December 15th Wushina, without any authority, brought suit in his own name against Cobb, which suit was pending until March 8, 1917. In June, 1917, an attorney for plaintiff interviewed the defendant, who promised to pay in a few days if Cobb did not. Further threats brought promises from the defendant to pay the note, which were repeated in the latter part of 1917 and the first part of 1918. Later, on February 1, 1918, defendant wrote to plaintiff promising to pay the note. A suit was brought in July, 1917, by the plaintiff against Cobb, who was shown to be insolvent.

Defendant cannot now set up laches on the part of plaintiff as a defense. Failure to bring suit against Cobb upon maturity of the note was clearly induced by the promises

of Washina. The rule is that where an endorser procures the postponement of action against the maker of a note by promising to pay the same, with full knowledge of the facts, such promise will be binding. Morgan v. Root, 41 Ill. 247.

There is no merit in the point that Washina was discharged because he was ordered to dismiss his suit against Cobb. Washina had no right to bring such suit because he was not the party in whom the legal title to the note was vested. Campbell v. Humphries, 3 Ill. 479. This is not a case where the endorser was ignorant of the attempt of plaintiff to recover from Cobb.

The judgment is right and is affirmed.

AFFIRMED.

189 - 25065

YELLOW CAB COMPANY.

Appellee,

vs.

MICHAEL ABRAMOFF and
HARRY L. ABRAMOFF, trading
as Abramoff Brothers,
Appellants.

In the matter of the contempt
of MICHAEL ABRAMOFF and
HARRY L. ABRAMOFF,

215 I.A. 644

Appeal from

Circuit Court,

Cook County.

MR. PRESIDING JUSTICE MESURSELY

DELIVERED THE OPINION OF THE COURT.

By this appeal defendants seek to have reversed an order of the chancellor of the Circuit Court fining each of them \$100 for contempt of court for violating a temporary injunction that had been granted on December 5, 1918.

The injunction was entered upon notice served upon the defendants and their appearance in open court. It enjoined them from conducting, using or operating on the public streets of Chicago and vicinity, any taxicab identical with or like the taxicab of the complainant, that is, with a cab body the larger part of which is painted yellow, with black mouldings, the upper part black. The injunctive order proceeds with an elaborate and detailed description of the design, style and finish of the taxicab whose imitation was prohibited. Subsequently a petition for a rule to show cause was filed, setting up the fact that the defendants, after due service of the writ of injunction upon them, had disobeyed the court's order and violated the writ. The rule was entered and respondents filed an answer. The matter came on for hearing, and after evidence the court found each of the defendants

guilty and entered the order fining them.

As the certificate of evidence is not before this court, the only questions before us relate to the jurisdiction of the chancellor to enter the preliminary injunction, and whether or not it is sufficiently certain and definite in its terms.

It does not seem to be seriously contended that the chancery court did not have jurisdiction of the parties and the subject matter and the power to enter the injunction. Illinois Statutes, Hurd, chap. 67, sec. 63; chap. 69, secs. 1 and 3; Clay v. People, 94 Ill. App. 598; People v. Kipley, 171 Ill. 44; Grand Opera House Co. v. Ripley, 166 Ill. App. 170; People v. McFeeny, 259 Ill. 161.

It is established by numerous decisions in this state that if the court has jurisdiction of the parties and the subject matter, an injunctive order made in the exercise of such jurisdiction must be obeyed until it is modified or set aside by the court making it, or reversed in a direct proceeding by appeal or on error. Leonold v. People, 140 Ill. 552; Clark v. Burke, 163 Ill. 334; O'Brien v. People, 216 Ill. 354; Franklin Union v. People, 220 Ill. 355; Christian Hospital v. People, 223 Ill. 244.

Defendants do not properly raise in the record the question of the certainty and definiteness of the injunction, for the reason that there are no assignments of error touching this. It has been held that a reviewing court cannot consider alleged errors which are not assigned. Anglo Wyoming Oil Fields v. Miller, 216 Ill. 273.

Injunctive orders containing prohibitions similar to those before us have been upheld as sufficiently definite and certain in Hokes v. Mueller, 72 Ill. App. 431; Mossler v. Jacobs, 66 Ill. App. 571; Feinstock, Lubin & Co. v. Marks, 109 Cal. 529;

Enterprise Mfg. Co. v. Isanders, Wray & Clark, 134 Fed. 923;
Fairbanks Co. v. Bell Mfg. Co., 77 Fed. 869.

The gist of the injunction order was to prevent the defendants from operating taxicabs which by reason of their shape, design, colors, etc., could be held to be an imitation designed to mislead persons desiring to hire taxicabs. It was not necessary in the order to define with particularity all of the details which might be construed to be an imitation.

Upon the record before us, and under the law, the judgments should be affirmed.

AFFIRMED.

CONTINENTAL AND COMMERCIAL
NATIONAL BANK OF CHICAGO,
Appellee,

vs.

OSCAR F. BRADY and THOMAS
S. BRADY,
Appellants.

2151A. 644

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE McSURLY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit as the holder of two promissory notes made by the defendants for \$1,200 each, payable to the order of Graham & Sons and endorsed by the payees. Upon trial by the court judgment was entered against the defendants for \$2,572.49 from which they appeal.

Complaint is made of the action of the trial court in sustaining objections to questions and to the admission of evidence tending to present a defense. The objections might properly be sustained on technical grounds alone, but in our view of the matter it is unnecessary to comment upon the form of the interrogatories, for the judgment must be affirmed for reasons of substance.

The items of fact which defendants sought to present were that the payees, Graham & Sons, bankers, on June 29, 1917, which was prior to the maturity of the notes in question, were forced into bankruptcy, at which time the defendants had on deposit with them a sum over \$4,000, and that about \$2,400 of this amount was the credit for said two notes; that the defendants never got any part of this, but it was simply credited to their account, and before they drew against it bankruptcy proceedings were begun, and thus the consideration for the notes failed. Even if this should be conceded it would not constitute a defense

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to the notes in the hands of another, a bona fide holder, and we find no contention in defendants' affidavit of merits or in their brief that the plaintiff was not a bona fide holder of the notes.

It appears that Graham & Sons were indebted to the plaintiff in a considerable amount, said to be about \$100,000, and that the notes made by the defendants, together with others aggregating about \$150,000, were pledged with plaintiff as collateral security; and it is claimed that in this collateral there were sufficient securities other than the Brady notes to pay the indebtedness to the plaintiff. We know of no rule which would compel the holder of collateral securities to proceed against any particular security rather than another. The rule has been stated frequently that the pledgee may proceed against any or all of the securities at his election, and cannot be compelled to proceed against one before resorting to another. 31 Cyc. 863, and cases cited. The creditor may collect the whole amount of the collateral, and if there is any surplus above his own debt he holds the same as trustee for his debtor. It was thus held in Peacock v. Phillips, 247 Ill. 467, where the court said: "In such a case the maker of the securities is not concerned how the pledgor and pledgee should settle between themselves but is held for the full amount of his debt. (Locke v. Newman, 73 Ill. 215)."

Defendants also sought to show by objectionable questions that Graham & Sons' indebtedness had fallen due and was extended after defendants' notes were pledged. It would make no difference even if this was the fact. In the absence of a distinct intention between the pledgor and pledgee to

affect the pledge, it continues as a valid security regardless of the changes in the original indebtedness. The rule is thus stated in 31 Cyc. 821, with cases cited:

"Where property is pledged to secure a note, the extension or renewal of the note, even though the new note is given only for an unpaid balance on the old one, or includes also another debt, or the change of the indebtedness into the form of a judgment does not, in the absence of a distinct intention of the parties, affect the pledge, but it continues as a valid and effectual security until the debt is paid."

No valid reason is presented for disturbing the judgment, and it is affirmed.

AFFIRMED.

OSCAR W. LUNDELL, trading as
LUNDELL BROTHERS,

Appellee,

vs.

CHICAGO ARENA COMPANY, a
corporation,

Appellant.

2151.A. 644

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE MCSURELY

DELIVERED THE OPINION OF THE COURT.

Plaintiff, a dealer in hardware, brought suit for items of merchandise sold and delivered, and upon trial by the court had judgment against the defendant for \$299.58.

Defendant says this judgment should be reversed for the reason that it was not the party who bought the goods; that it is a corporation owning a large building at 5975 Broadway, Chicago, which it had used for some years as a skating rink and restaurant, but that on the first of June, 1918, this was leased to one Harry C. Wood, who had been defendant's vice president; that on that date Wood took possession and made certain changes for which the hardware in question was purchased, and hence Wood is obligated for this bill, and not defendant.

The court could properly find from the evidence that the defendant had been making similar purchases of the plaintiff from time to time for about three years before the particular indebtedness in question was incurred; that these purchases were made for defendant by its authorized agent, August Quandt, all of which had been paid for by the defendant when bills for the same were presented; that the first order given for the goods in question was on June 3, 1918, written upon stationery bearing the name of the Chicago Arena Company, the defendant, and that

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like orders were made out for the various items claimed by plaintiff, upon the same kind of stationery and signed with the defendant's name, by Quandt. No notice of a change in ownership or management from defendant to Wood was ever given to plaintiff or to the public, so far as the evidence shows.

The rule is that where a person was formerly the general agent of another in a certain line of business, his acts as such within the scope of the authority formerly possessed by him will still bind his former principal after the authority has been determined, until the parties who have been and continue dealing with him as such agent are informed of the determination of his authority. Diversy v. Kellogg, 44 Ill. 114; Mentelione v. Republic Iron & Steel Co., 143 Ill. App. 413; Merchants' Bank v. Nichols & Co., 223 Ill. 41. We hold that the trial court was justified in applying this rule to the facts of this case, and correct in its conclusion that under the evidence liability for the price of the goods sued for should be upon the defendant.

Wood's management of the enterprise was not successful, and negotiations were entered into by him with his creditors looking towards an agreement and settlement of his obligations. At a meeting of creditors, including the plaintiff, a tentative proposition was submitted looking towards such a settlement, which plaintiff was willing to enter into, and indicated such willingness in writing. This involved the formation of a new corporation to take over Wood's assets and to issue stock to be held by a trustee for the creditors, as collateral security for a note to be executed by Wood. The record does not disclose that any such company was organized or that any of the proposals were carried out or any settlement in fact consummated. Defendant asserts that these facts prove an agreement on the part of plaintiff to accept Harry C. Wood as its debtor, and hence there has been a novation.

We cannot agree to this contention. There are four essential requisites to novation: 1st, a previous valid obligation; 2nd, agreement of all parties to the new contract; 3rd, extinguishment of the old debt; 4th, validity of the new contract. Neither the second, third nor fourth of these elements are present here. Mere negotiations and suggestions looking towards a settlement do not amount to an agreement for a new contract nor the extinguishment of the old, nor a valid new contract. Keyward v. Burke, 151 Ill. 121; John Deere Plow Co. v. Leeper, 194 Ill. App. 92.

There is point in the suggestion by plaintiff's counsel that defendant's novation theory involves the admission of a previous valid obligation of the defendant for the goods in question.

We see no reason to disturb the judgment, and it is affirmed.

AFFIRMED.

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on the principle of the "poll tax," is a
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The present system is based on the principle
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235 - 25112

JOSEPH BABKA,
Appellant,

vs.

ANTON WODNANSKY et al.,
Appellees.

215 L.A. 645
APPEAL FROM CIRCUIT COURT,
COCK COUNTY.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Complainant, Babka, filed a bill seeking to foreclose a deed of trust given to secure a note for \$1,600 and made by the defendant Anton Wodnansky. It was claimed by the defendant that a payment of \$1,400 had been made on account of this note, leaving due only \$200. After hearing testimony this defense was supported by the master's report, and after hearing by the chancellor upon exceptions a decree was entered confirming this report, from which complainant appeals.

The undisputed facts are that one Robert L. Fitte, who for many years had been engaged in the real estate and mortgage loan business in Chicago, on December 10, 1903, made a loan of \$1,600 to Anton Wodnansky and his wife, Anna (who later died), taking therefor their promissory note for that amount, payable five years after date, with interest, at the office of Robert L. Fitte & Son, Chicago, the note being payable to their own order and by them endorsed, and secured by a trust deed executed by them of even date, conveying the real estate therein described to Hugo L. Fitte, trustee. Hugo is the son of Robert L. Fitte, and subsequent to this transaction the father and son were partners in the business. Robert Fitte held and owned the note until its maturity in 1908, and pursuant to notices and the terms of the note and trust deed Wodnansky paid the interest at Fitte's office. When the note matured it was extended to 1913 and a new set of interest

notes were given, and again in 1913 a new extension was made in like manner, all the negotiations being between Robert Pitte and Wodnansky. In 1911 the notes and trust deed were sold by Pitte to Joseph Babka, the complainant, but of this Wodnansky had no notice or knowledge. The note and trust deed were delivered by Pitte to Babka, but when interest fell due the interest note would be brought by Babka to Pitte and by Pitte be delivered to Wodnansky, who paid the interest pursuant to notice, as he had always done since the transaction was begun in 1903.

On January 2, 1917, Pitte sent to Wodnansky a notice that his note for \$1,640 was due December 10, 1916, and to call at his office for payment or extension. Pursuant to this notice Wodnansky called at Pitte's office on January 4, 1917, and paid the interest due, amounting to \$40. On January 8th he called at Pitte's office and paid him \$1,400, receiving therefor the following:

"Robert L. Pitte & Son
Mortgage Bankers, Real Estate and Loans
901-903 W. 20th Street, Cor. Peoria

\$1400.00 Chicago, Jan. 8, 1917

Received of Mr. Anton Wodnansky \$1400.00

Fourteen Hundred - Doll

to be paid to him a/c loan months after date with interest at the rate ofper annum. No interest allowed if paid before time specified.

Robert L. Pitte

No Interest after Maturity."

The words and figures underscored were in writing, inserted in a printed form.

At that time there was some conversation as to whether Wodnansky wished to pay off the note or have it extended, who said that he did not have the \$200 remaining due with him but had it at home and would get it and pay off the note. This, however, was not carried out. On January 29, 1917, Pitte filed his petition in bankruptcy, and scheduled among other claims an indebtedness to Wodnansky of \$1,400. Pitte died the following May.

It is conceded in complainant's brief that if Wodnansky

without notice or knowledge that Pitte was not still the owner of the note and trust deed, gave him \$1,400 as a payment upon the note, such payment was binding upon the complainant, and that this is the rule in this state. McAuliffe v. Reuter, 166 Ill. 491; Napieralski v. Simon, 198 Ill. 384; Lartins v. Kuhlke, 186 Ill. 327; Buehler v. McCormick, 169 Ill. 269.

It would seem to be equally clear that as between Wodnansky and Pitte it was the intention and understanding of the parties that the \$1,400 was a payment on account of the principal note then due; that this was to be applied at once, and the balance of \$200 extended until some near time when the entire note would be paid.

The controversy centers on the purpose and effect of the writing given by Pitte at the time of this payment. Complainant calls it a certificate of deposit, and seeks to invoke the rule that parol testimony cannot be received to vary or alter its terms. Inspection of the paper indicates its mongrel and ambiguous character. Pitte evidently used a printed form of an ordinary certificate of deposit, and attempted by inserting the written words and figures indicated to make it a simple receipt. It cannot be called a certificate of deposit as there is no provision for maturity or interest. The most that can be said for the instrument is that it tends to support Wodnansky's statement that he paid the sum of \$1,400 to Pitte upon the date mentioned in the writing on account of the loan. Under such circumstances Wodnansky's testimony is permissible as explaining the transaction.

As there is no question as to the fact of this payment, and as we must construe it to have been a payment on account of the principal note, the rule above referred to must be applied and such payment held binding upon the complainant.

The decree is affirmed.

AFFIRMED.

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254 - 25131

ANTON J. CERMAK, Bailiff, for
use of NICHOLAS HAMEL and
RELIANCE GARAGE,

Appellee,

vs.

HERMAN A. MUHLVEN, PATRICK
BARRELL and G. J. ARNOLD
(Defendants)

On appeal of G. J. ARNOLD,
Appellant.

215 I.A 645

Appeal from

Municipal Court

of Chicago.

MR. PRESIDING JUSTICE MCSURELY

DELIVERED THE OPINION OF THE COURT.

Plaintiff in an action in debt upon a replevin bond
had judgment in debt of \$400, damages \$302, debt to be
satisfied on payment of damages.

It would be useless to state the facts in this case
or discuss the points presented, for the reason that we are
of the opinion the appeal is improperly before us and must
be dismissed.

The judgment was against the defendants Herman A.
Muhlven and J. G. Arnold. They jointly prayed an appeal to
the Appellate Court, which was granted on condition that they
file an appeal bond. Arnold only has filed such a bond and
attempts to prosecute this appeal. It has many times been
held by the courts of this state that as the appeal is pure-
ly statutory, a party to avail himself of such a right must
comply strictly with the conditions ordered by the court
granting the appeal, and that when a joint appeal is prayed
and allowed, all the appellants must sign the appeal bond
or the appeal will be dismissed. Hileman v. Beale, 115 Ill.

355; Tedrick v. Wells, 152 Ill. 214; Town v. Howieson, 175 Ill. 85; Ellison v. Hammond, 189 Ill. 470; Fortune v. Gilbert, 207 Ill. 235; Congregational Church of Harvard v. Page, 255 Ill. 267.

This point has been raised by the appellee, and therefore there is nothing for this court to do but to dismiss the appeal.

APPEAL DISMISSED.

266 - 25143

NORTH SIDE BUICK SALES CO.,
Appellee,

vs.

CHARLES A. STEWART,
Appellant.

215 I.A. 645

APPEAL FROM CIRCUIT COURT,

COCK COUNTY.

MR. PRESIDING JUSTICE SCHUBERT.

DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to have reversed a judgment finding the right of property in the plaintiff in a suit of replevin. The evidence presented to the court and jury tended to show that on November 14, 1917, defendant purchased from the plaintiff a new Buick touring car for \$1,332, paying \$100 and turning in a Ford automobile which he owned for \$360, which made a total first payment of \$460; he gave notes for the balance of the purchase price, secured by a chattel mortgage on the Buick automobile. The first twelve notes were for \$40 each, payable monthly, and the last note for \$554.00. Defendant delivered the Ford automobile to the plaintiff and paid the first note. He then stated to a Mr. Herbison, manager of the plaintiff company, that he thought he could sell the Ford for a larger sum than he was allowed by the plaintiff, and suggested that he be permitted to take the Ford and give the company a check for \$360 dated November 15th, as it would require a few days for him to consummate the sale of the Ford. This was agreed to, the check accepted and the Ford delivered to the defendant. When the time came for the check to be paid there was no money to defendant's credit in the bank upon which the check was drawn. Plaintiff, through its manager, called on defendant a number of times either to pay the check or return the Ford, and offered to take possession of the Ford and hold it for ninety days and permit defendant to sell it

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at any time during that period, but defendant refused either to pay the check or return the Ford. Demand then was made for return of the Buick but it was refused.

The chattel mortgage contained a provision that in case the mortgagee should at any time deem the debt or said security insecure, the whole amount secured might be declared immediately due and payable and the mortgage foreclosed, and the mortgagee might take immediate possession of the property. Acting under this clause, plaintiff declared the entire amount due and sought to recover possession of the property by this replevin suit.

It is said that defendant is a man receiving a good salary, and that plaintiff had no valid reason to believe that it was in danger of losing its security, and that its action in the matter was arbitrary and without good grounds. The rule is that the discretion given to a mortgagee must be exercised in good faith and that he must have reasonable grounds for feeling insecure, but that an actual danger is not necessary as a basis for acting under the provisions of the mortgage. As was said in Roy v. Goings, 96 Ill. 361, "it was sufficient if at the trial it appeared that at the time of the taking there was apparent danger, such that a reasonable man might in good faith act upon it." See also Hogan v. Aiken, 131 Ill. 446. Applying this rule to the circumstances present, we cannot say that the jury did not properly conclude that on account of defendant's actions with reference to the Ford car and the check which he gave in lieu thereof, plaintiff had reasonable grounds for believing itself insecure.

The record shows that a proper demand was made. The documents introduced in evidence were properly in the case and it was not error to permit them to be inspected by the jury.

There was no error in the rulings of the court upon instructions, and as the judgment was correct it is affirmed.

AFFIRMED.

215 I.A. 645

THE PEOPLE OF THE STATE OF
ILLINOIS.

Defendant in Error.

vs.

JOSEPH WEIL.

Plaintiff in Error.

ERROR TO CRIMINAL COURT

OF COOK COUNTY.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The defendant, Joseph Weil, appeals from a judgment of the Criminal Court of Cook County entered in that court on a verdict of a jury finding him guilty under the first count of an indictment which charged him with others, with unlawfully conspiring to obtain \$2,200 from Arthur McNally by means of the confidence game.

The evidence introduced on the trial discloses that Arthur McNally in June, 1913, met in Chicago one Wilson, who was identified on the trial as the defendant Weil. There were present at this meeting, besides the defendant and McNally, one Murphy, whose real name is Clarence Forbes, one Gorman and one Rogers, whose name is George Wakefield. Weil informed McNally that he was private secretary to one Colonel Starr; that he, the defendant, desired to procure two stakeholders to hold money which was to be wagered upon a prize fight to be held later. McNally testified that some ten days following this meeting he, McNally, Rogers and one Larson met the defendant at Bismarck Garden, Chicago, where the defendant stated he was "ready to pull off the boxing match and for us to be ready at a moment's notice. We were to hold the stakes; that is, Larson and myself. * * * He was to pay us a commission from 5 to 10 per cent."

On July 5, 1913, McNally received a telephone call from the defendant to meet him at Logansport, Indiana. Rogers, Murphy, Larson and McNally went to Logansport where the next morning they met the defendant at a hotel. The defendant then

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informed McNally that the prize fight was to be held within a few days. On this occasion the defendant introduced a co-defendant, Snarley, to McNally as Dr. Barnes. Prior to this meeting Weil, the defendant, had represented to McNally and Larson that Colonel Starr, his employer, was a member of a California syndicate and was anxious to wager a large sum of money on the result of the prize fight. There were present at the meeting in Logansport the defendant, Starr, Murphy, Gorman, Larson, Dr. Barnes and McNally. McNally testified:

"I don't remember whether it was Colonel Starr or Wilson that opened the betting. One of them opened a purse with \$10,000. There was \$2,000 handed to me in \$100 bills to open the purse for Wilson. Colonel Starr covered it. It was part of the purse running about \$12,000. The money was handed to Murphy; he brought it to Wilson. Murphy brought me another \$2,000. That was covered by Colonel Starr and that was taken to Wilson. That was repeated several times. Dr. Barnes started betting \$1,000 to \$2,000. The bets ran up to about \$50,000. There we quit, then an argument came up about the balance of the purse. Colonel Starr wanted the balance of the purse and Wilson didn't know where to raise the money."

Later on the day of this meeting Larson and McNally returned to Chicago. The evidence shows that the meeting at Logansport was broken up because of an objection made by Starr that the total amount of the prize money, \$12,000, had not been staked. Weil met McNally and Larson in Chicago the following day and induced them to help him to make up the balance of the purse, as the defendant put it, "to save him from disgrace and keep his family from disgrace." Larson and McNally agreed to advance \$1,400 and \$2,200 respectively to make up the purse and the defendant promised to pay them as high as 15% for advancing this money. On July 10th at Logansport, McNally gave defendant the \$2,200 and Larson gave him the \$1,400; this was done in the presence of Murphy and Gorman, who were supposed to engage in the prize fight. All of the parties then got into two rigs, drove to a place in the woods, where they stopped and Murphy and Gorman, the supposed prize-fighters, stripped for the fight. Weil was appointed referee and timekeeper. The money which had been

wagered upon the fight, for holding which McNally and Larson were to receive a commission, and the purse was supposed to be contained in a black grip. A part of McNally's testimony concerning the fight is as follows: "They sparred around and Murphy hit Gorman and he dropped to his knees. Wilson started to count ten, but Gorman got up. After their first round Wilson called time again, Gorman hit Murphy and Murphy dropped and blood or something came out of Murphy's mouth; then Wilson started hollering that his man, Murphy, was dying, and he ran to get a doctor, and he grabbed his grip, and we haven't seen him then for two or three years." Dr. Barnes made an examination of Murphy with a stethoscope and said that he was seriously injured and that he had a hemorrhage and was not expected to live. The parties then returned to Logansport. Later in the day the defendant telephoned to Larson and McNally at the hotel, saying "They are watching me."

The above statement gives the main facts of an unlawful conspiracy to obtain money from McNally. The evidence shows that the defendant Weil was the leader in a scheme to defraud McNally out of the sum of \$2,200. The story of the plot as adduced from the testimony of the State's witnesses was not denied at the trial insofar as the conduct of the defendant Weil is concerned.

The evidence shows that the defendant with others had been indicted and previously tried in the Criminal Court of Cook County for defrauding Larson. The trial court sustained objections to the introduction of records which were offered for the purpose of proving the verdict of the jury finding the defendant Weil not guilty of this charge and the judgment of the court based thereon. It is insisted for the defendant that under his plea of not guilty it was permissible for him to introduce evidence of a former acquittal. Certain records tendered as proof of a former acquittal show that the defendant was indicted, with other persons, under separate indictments for defrauding Larson. So far

as the tender of the records is concerned they were offered for the purpose of showing a former acquittal in a trial under an indictment charging that the defendants conspired to obtain \$1,400 from Larson by means of the confidence game. There is nothing in the proof offered which tends to show that it was competent for the purpose of showing a former acquittal. The indictment charging a conspiracy to defraud Larson and an acquittal thereunder if shown by the evidence would not tend to prove a former acquittal of the offense charged in the indictment charging a conspiracy to defraud McNally. In People v. Wendelson, 264 Ill. 456, the Supreme court said:

"While it is true that plaintiffs in error could not be tried again for an offense for which they had been previously tried, the record offered shows that the charge for which they were formerly tried and acquitted was entirely different from the charge in the case at bar on which they were tried and convicted. In the former trial they were tried for the burglary and larceny of the goods of Goldstein, Harris & Cushman. In the case at bar they were tried for the burglary and larceny of the goods of Lerach & Stickler."

The abstract of record filed here fails to disclose what evidence was introduced on the trial of the instant case which tended to show what McNally and Larson testified to on the trial of defendant under the indictment for conspiracy to defraud Larson and we are therefore compelled to assume that the rulings of the trial Judge with reference to the admission of this evidence and the conclusions of the jury on the issues submitted were correct. People v. Niehoff, 266 Ill. 103; Pedern v. McNaul, 179 Ill. 203.

It is asserted that the court erred in admitting evidence tending to prove that the defendant was a guilty party to other conspiracies similar in their nature to the one involved in the present case. This question is discussed in an opinion of this court delivered at the present term in a case wherein the defendant Weil is party defendant, being the case of People of the State of Illinois v. Joseph Weil, No. 24975, and for the reasons therein expressed we hold that the rulings of the trial court in this particular were not erroneous.

People v. Buckminster, 282 Ill. 177.

So far as we are able to determine from the record the trial court did not err in overruling a challenge of the twelfth juror impaneled to decide the case; this juror had been accepted by both sides before the challenge was made. The juror was first challenged for cause, which challenge was overruled and counsel for defendant then challenged him peremptorily and this challenge was also overruled. The record does not disclose whether the defendant had any peremptory challenges left at the time this challenge was presented to the trial court, but in any event a peremptory challenge of a juror is not a matter of right after the juror has been accepted by both parties. Mayers v. Smith, 121 Ill. 442.

The trial court did not err in providing in the judgment in the present case that the term of imprisonment imposed upon defendant Weil should take effect after service by him of a sentence imposed by the court on a conviction under another indictment at the same term of court. This question is also discussed in case No. 24975, supra, and the reasons stated there are adopted here.

No defense was made on the trial to the charge that Weil, the defendant, was the moving spirit of a conspiracy which was organized for the purpose of swindling the prosecuting witness McKally and others. The evidence shows beyond all question that Weil is a confidence man and the judgment against him should not be reversed unless we are convinced from an examination of the record that errors have intervened which were calculated to result in an unjust verdict and judgment. No such errors were committed in the present trial and the judgment against Weil should be and it is affirmed.

AFFIRMED.

PEOPLE OF THE STATE OF ILLINOIS
Defendant in Error.

vs.

JOSEPH WEIL et al.,
Plaintiffs in Error.

215 I.A. 645

ERROR TO CRIMINAL COURT

OF COOK COUNTY.

MR. JUSTICE DEWEY DELIVERED THE OPINION OF THE COURT.

The defendants, Joseph Weil and James Neag, were found guilty of conspiracy by the verdict of a jury in the Criminal Court of Cook County and each defendant was sentenced to a term of five years in the State penitentiary and to pay a fine of \$2,000.

The indictment, consisting of two counts, charged the defendants and others with conspiracy to obtain \$15,000 from Charles H. Worden by means of the confidence game and by false pretenses.

The evidence shows that Charles H. Worden was president of a Fort Wayne, Indiana, National Bank; that on August 13, 1917, he was approached at Fort Wayne by William W. Hall, who claimed to represent certain French, German and English capitalists who had determined to invest money in the United States. Worden offered to sell certain property in Indiana to Hall for \$75,000. The following day Hall informed Worden that he thought the property would be accepted and that he had phoned certain persons at Pittsburgh whom he expected to come to Fort Wayne. Some days thereafter Hall appeared at Fort Wayne and introduced Worden to one James R. Wilson, who was identified at the trial as defendant Joseph Weil. Weil stated to Worden that he represented the foreign capitalists; that the property offered for sale to Hall would be accepted and that he, Weil, was desirous of purchasing other and more extensive properties. Worden referred him to certain other large properties

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and Weil stated that he had bought a paper mill in Wisconsin and that he said those whom he represented were about to buy one in New York. Worden then informed Weil that he had a paper mill at Hartford City, Indiana; told him of its history and extent and gave him a letter to the manager of the mill. On August 22, 1917, Worden received a telephone message informing him that Weil and a Judge Osborne were at Hartford City and that they would call on him the next day. Subsequently in response to a telephone message from Weil, Worden met him at Chicago and in a room occupied by Weil in the LaCalle hotel he discussed with Weil the sale of the Hartford City plant. Later on the same day Worden called at the office of Osborne and offered to sell the mill for \$1,500,000 and insisted upon a cash deposit of \$100,000. September 1, 1917, Hall and one Major Peverisham met Worden at Fort Wayne. Peverisham stated that he was sent there by parties in New York, one of whom was Baron Ernst, to look over the property; that they had favorable reports regarding it and were to deposit in a few days \$100,000 in the National Park Bank of New York. On September 2, 1917, Weil, by telephone, asked Worden whether it made any difference if the deal was closed in New York or Chicago. Worden intimated that it would be more convenient to transact the business in Chicago, and he was requested by Weil to come there, which he did the following day, accompanied by Mr. Miller, Secretary of the Hartford City Paper Company; they met Hall, Weil, Peverisham, and Osborne in Hall's room at the LaCalle Hotel. Weil informed Worden that Baron Ernst and Mr. Enriquez would arrive in Chicago that day. Hall at this meeting informed Worden that Weil was a high-salaried employee of the Standard Oil Company. The record shows that Hall's real name is Frank Parbaugh. Hall represented that he was a brother-in-law of Weil's. Weil, who during all the various transactions with Worden, was known

as James R. Wilson, showed Worden a ring which he said was given to him by John Hays Hammond and that the diamond in the ring had been given to Hammond by Cecil Rhodes. Hall at this time exhibited to Worden a copy of McClure's Magazine for April, 1914, which contained an article relating to high salaried men. The article contained a picture of Wilson and bore the heading, "\$100,000 Salaried Men. James R. Wilson. By Edgar Cott Woolley." Weil promised to deliver the contract for the sale of the Hartford City Paper Company to Worden by five o'clock that evening. At seven o'clock that evening Worden, Osborne and Miller met Hall, Faversham and Weil in Pall's room, where it was announced that Baron Ernst could not come to Chicago that day and that the deal could not be closed for a few days. Worden and Miller went back home and the next day Worden received a telephone message from Weil stating that he would like to see him about a personal matter in which the other men were not interested. The next day Worden went to Chicago where Weil informed him that he had been an engineer for Standard Oil Company for many years; that he had received a letter from a sick friend informing him that he had discovered valuable mining property in Arizona and asking him, Weil, to help develop it. Weil informed Worden that he had investigated the property and that it was very valuable; that it adjoined the Big Verde Mine which belonged to the Morgan and Clark interests; that he had procured a leave of absence from Mr. Archibald, President of the Standard Oil Company, to develop the mine; that he, Weil, had made certain contracts with Fairbanks-Morse & Co., and other firms, and had bought machinery and was developing the mine; that the Morgan interests, who owned the adjoining property, had violated the law of the apex, had encroached upon the mining property in question and had become liable in a large sum for damages. Weil also read to Worden a letter which purported to be from his, Weil's, brother, which stated, "For God's sake, now is your chance.

Get hold of the balance of that stock." Weil stated that he knew where a large amount of the stock of the company which owned the mine could be procured; that he had picked up a block of 10,000 shares which he could sell for \$2 a share, and that with the \$20,000 acquired for this stock he could get a large block of the stock in Chicago, which when procured he would sell to the Morgan and Clark interests. He informed Worden that because of his relation to the Standard Oil Company he did not want to appear in the matter, saying to Worden, "I want you to go with Hall over to a broker's office and sell this stock for \$2 a share." Worden and Hall went to an office in the Rector building, Chicago, the door of which bore the title, "Frewster, Whitney & Leach Company, Bankers and Brokers." Several men were in the office at the time and there appeared to be a number of clerks employed there. Hall asked for a member of the firm and was referred to Mr. Whitney's room, where after much conversation Whitney agreed to pay \$20.00 a share for the 1,000 shares of stock, and at Hall's request that was supposed to be \$20,000 in currency was paid therefor. The evidence shows that Whitney and the defendant Head were one and the same person. Hall and Worden returned to Weil, who said they would go and get the other stock that had been spoken of. They drove together to East Chicago to the home of a man named Michael J. Riel. When asked by Weil if he had any of the stock Riel said "No," to which Riel replied that he had heard Riel was a large owner of the stock and that he, Weil, represented the minority stockholders and wanted to reorganize the company. Riel asked him, "Who told you that I had stock in the company?" Weil replied, "Blair." Riel finally admitted that he had some stock, but that his wife did not want him to sell it; that it had cost him \$85,000 and that he would not sell it for less than that sum.

Weil said that he would talk with Mrs. Riel and went alone to an upper floor in the building. On his return it was agreed that the stock would be sold to Weil for \$85,000 and would be placed in escrow pending the delivery of the purchase price. On the return trip to Chicago Weil said that he would have no difficulty in getting the money; that he had \$20,000 and a letter of credit for \$10,000 and that all he needed to complete the amount was \$55,000. Before reaching Chicago, Weil entered a telephone booth for the purpose, he said, of telephoning to a friend for this latter sum. On coming out of the booth, however, he informed Worden that his friend was in Mackinaw; that his, Weil's, partner, would help him out, but that he would be short about \$15,000; that he could arrange to sell the stock for \$4.00 a share and he asked Worden if he could not advance the money. Worden said that he would go to the First National Bank and that Weil could telephone him how much he needed. Weil called up Worden at the bank and told him he needed \$15,500. Worden procured this sum, placed it in an envelope and he and Weil drove to East Chicago to Riel's residence. Worden gave Weil the \$15,500 and got in return a certificate of the stock, which purported to be for 85,000 shares of stock in the Decatur Copper Mining Company; it was dated August 10, 1919, and bore the signatures, "George R. Bacon, Secretary," and "William J. Payne, President." On the return to Chicago Weil stated that he desired to purchase another block of the stock from one Borden and he requested Worden to go with Hall to Whitney's office and get the money to be paid for the 85,000 shares and to take out of the sum the amount which Worden had advanced on the Reil stock. Worden and Hall went to Whitney's office, who there stated that because of the size of the deal his father, for whom he was acting, was coming to attend to the matter personally. Worden then went with Hall to Hall's room

in the LaSalle Hotel. Weil called them on the 'phone at this address and was told what Whitney had said and he responded, "That's too bad, as I had arranged to take the stock from Mr. Borden and he had agreed to sell it." Worden said in reply, "The best thing you can do is to take an option on it to close up on the 14th." Worden returned to his home in Indiana. Hall accompanied him to the railway station and he never saw the defendants again until he met them at the time of the trial. Worden testified that he examined a copy of McClure's Magazine for April, 1914, but did not find therein the article referring to James R. Wilson; he never received back any part of the \$15,500 delivered by him to the defendant Weil. The offices occupied by Whitney, Brewster & Loeb in the Rector building were rented by Head and were vacated about a week after Worden had delivered the money to Weil. The signatures of Payne and Bacon on the stock certificate were shown to be forgeries. Judge Osborne rented a room for one month in an office occupied by a law firm; his name was placed on the door, but he visited this office but twice.

Evidence was introduced of other transactions wherein the defendant Weil, using the name of Wilson, by conspiring with others and by means similar to those above referred to, had fleeced other victims of large sums of money. In one of these cases a man named Leach was shown a write-up in the Mining Engineers' World which purported to tell of the important employment of Weil. In this transaction Weil used an office in Chicago upon the door of which was inscribed, "Dow, Morgan & Loeb." The Dow of this firm was the defendant Head. The stock in this case was procured from one Meyer in East Chicago, and the stenographer employed by Dow, Morgan & Loeb testified that all she ever did for the company was to copy names out of the telephone directory.

From an examination of the evidence introduced upon

the trial it is impossible to escape the conclusion that the verdict of the jury and judgment of the trial court thereon were right. The evidence discloses a system, of which the defendant Weil was the head, by which several persons were swindled of large sums of money, and the methods adopted by the conspirators in all the cases referred to in the evidence were clearly the work of the fertile mind of Weil, the real head of the conspirators. It would serve no useful purpose to discuss at length all the facts and circumstances attending the frauds which were practiced by the defendants. It is sufficient to say that the jury on the evidence could not have returned a verdict of not guilty.

It is insisted that the State's attorney in the course of his argument improperly referred to the defendants as crooks. On objection the court cautioned counsel "to refrain from calling anybody a crook." The defendants did not testify in their own behalf and it is urged that the State's attorney committed reversible error when in his argument he called the attention of the jury to the fact that the defendants had not put on a single witness to contradict the evidence introduced by the State. The evidence introduced by the State leaves no doubt as to the guilt of the defendants. The unanswered and unexplained testimony of the State shows without much question that both defendants were engaged in a premeditated scheme to defraud the prosecuting witness, and while the language of the State's attorney was somewhat strong it did not amount to reversible error. The attention of the jury was not particularly called to the fact that the defendants did not testify in their own behalf, and it was proper for counsel for the State to assert that no real attempt was made by the introduction of testimony or otherwise to meet the damaging story told by the witnesses for the State concerning the transactions and conversations of the defendants occurring at different places and extending over a

considerable period of time.

In People v. Strauch, 240 Ill. 79, the Supreme court said:

"What is proven by direct testimony or is inferable from the facts and circumstances proved and which has a bearing upon the issues may be a fair subject for comment by counsel, and if such deductions or inferences tend to fix upon a defendant the wickedness of the crime charged against him, it is within the scope of proper and fair argument to denounce him accordingly."

Grocker v. People, 213 Ill. 287.

The defendant Weil was found guilty of another offense in general similar to the one charged in the present indictment, at the same term of the Criminal Court at which the present judgment was entered. On motion of the State a judgment was first entered in the present case and following this a judgment was entered in the other case known in the Criminal court as No. 1662, service of the sentence imposed in the latter case to commence on the termination of the sentence in the present case, which was known in the Criminal court as No. 13164, and in that it appears that case No. 1662 was tried before the present case it is said that the judgment in that case should have been the first entered in the Criminal court. We are unable to see any merit in this contention. A writ of error sued out in case No. 1662 is also decided at the present term of this court and the judgment therein is affirmed. It is given as a reason for the action of the trial Judge that an affirmance of the judgment of the Criminal court was more likely to be had in a reviewing court in the case last tried and that in that event no confusion would follow a reversal of the first case tried. But whatever may have been the reasons for the action of the trial court, no authority or reason has been presented to this court why the trial Judge did not have the power to enter a judgment in either case at any time within the term.

In the case of People v. Elliott, 272 Ill. 592, the

court held that where a sentence is for a cumulative term under different counts of the same indictment, "the sentence should provide for a specified time of imprisonment under each count." Here we have separate indictments, a judgment under each indictment and a sentence of the court which substantially complied with the rule laid down in the Elliott case supra.

It is insisted that the trial court erred in admitting evidence of other transactions than the one referred to in the indictment under consideration. The case of People v. Buckminster, 282 Ill. 177, satisfactorily disposes of this objection. The evidence in question was by the ruling of the court specifically limited to the charge against the defendant Weil. The other transactions referred to in the testimony complained of related to the conduct of this defendant. This testimony was admissible for the purpose of showing motive, purpose and intent. It clearly established the peculiar methods employed by this defendant, but even if it could be said that the admission of this, as well as other evidence complained of, was erroneous, such error would be no ground for the reversal of the judgment so well supported by the evidence.

In People v. Weil, 244 Ill. 176, a case wherein Weil was also party defendant, the Supreme court said:

"Proof of other similar transactions are admissible in this class of cases to prove criminal intent."

In the Buckminster case supra it was held that certain error committed in the trial of the case would have required a reversal of the judgment had not the evidence so completely and thoroughly established the defendant's guilt.

The judgment of the Criminal court should be and it is affirmed.

AFFIRMED.

215 I.A. 646

WILLIAM MOORE O'CONNOR, a minor,
by Frank O'Connor, next friend,
Defendant in Error,

vs.

ERROR TO CIRCUIT COURT
OF COOK COUNTY.

JOSEPH LIPINSKI, ISADORE SHARPE,
and JULIUS GAMM and ISADORE GAMM
partners, doing bus. as GAMM BROTHERS,
Plaintiffs in Error.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The defendants in this case seek by writ of error to reverse a judgment entered in the Circuit Court of Cook County in favor of William Moore O'Connor, a minor, for the sum of \$15,000.

In June, 1916, the plaintiff, then six years of age, was injured by having his right hand caught between a running cable and a pulley wheel, which constituted a part of hoisting machinery situated in a building in the course of erection at 5138 West Chicago avenue, Chicago. The defendant Joseph Lipinski, the owner of the property in question, entered into a written contract with the defendant Isadore Sharpe, under which Sharpe agreed to furnish all the materials and to perform all the labor necessary for the erection of a two story building for defendant on the land in question, the building to be completed on or before September 1, 1916. The evidence does not disclose that under this contract the defendant, Lipinski, reserved to himself any right to control the means or methods to be adopted in performing the work required under the contract, nor that he had failed to use reasonable care in the selection of a competent and responsible contractor to erect the building.

The general contractor, Sharpe, sublet the doing of the mason work on the building to the defendants, Julius Gamm and Isadore Gamm, who used the hoisting machinery. At the time of the accident the side walls of the building were partly erected

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and the front wall, which was to extend parallel with the north line of West Chicago avenue, had not been constructed. An area-way about two and one-half feet wide extended between the basement front wall and the sidewalk, over which were placed planks which permitted passage from the sidewalk to and from the building. The material hoisting machinery which was operated by horsepower was located about in the center of the building. It was possible when this machinery was not in operation, by the removal of a pin to move the two platforms, which were used for hoisting the building material, and when so moved the cable connecting the machinery would revolve upon a pulley located in the southwest corner of the building.

On June 16, 1916, the plaintiff, who resided with his parents in the immediate neighborhood, went to the building where he found his two uncles with other boys, all being boys ranging between 12 to 15 years of age, engaged in playing with and upon the two platforms of the hoisting machinery. One of his uncles was present when the plaintiff rode upon one of the platforms. Shortly thereafter the plaintiff went to the southwest corner of the building and in attempt to remove some sand from the pulley block his hand was caught between the pulley and the rope or cable and he sustained injuries which resulted in the amputation of his third, fourth and fifth fingers of his right hand. The movement of the rope and pulley was caused by the conduct of the other boys in riding upon the platforms of the machinery located near the center of the building.

We deem it advisable to consider but two of the several alleged errors urged as reasons for reversal of the judgment. It is insisted that the court erred in refusing to direct a verdict of not guilty as to the defendant Lipinski, the owner of the premises in question. Lipinski cannot, under the evidence, be charged with any responsibility for the injuries which the plaintiff sustained. He did not own, operate or

control the machinery used in the erection of the building, nor did he under his contract with the general contractor, Sharpe, retain the right to control the manner or method of doing the work required thereunder.

It is, of course, true that as owner of the premises Lipinski would have had the right to determine for himself whether the contract was being properly performed as required by its terms. This right, however, gave him no such control of the doing of the work as would render him responsible for any negligence on the part of the general contractor or his agents or subcontractors. The contract provided that Sharpe, the general contractor, was "to erect and finish the new building * * * in a good workmanlike and substantial manner, to the satisfaction of the said owner."

Under the contract Sharpe, the general contractor, was required to build and complete, except as to the decorations, etc., the entire building, and there is but slight evidence in the record which tends to show that Lipinski exercised any control over the actual doing of the work upon the building.

In answer to a question whether he had exercised any control over the erection of the building, Lipinski said: "Well, a little." This testimony, when considered in connection with all the other evidence in the case, cannot be said to be sufficient to authorize the judgment against this defendant. It is clear on the whole evidence that the building was in the possession and control of Sharpe, the general contractor, and the sub-contractor. While it would have been possible for the parties to the contract to alter its terms by their acts and conduct in connection with the

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doing of the work, the evidence fails to disclose any action on the part of Lipinski which indicates that he interfered, or attempted to interfere, with the work being done on the building. His testimony given on cross-examination that when he "found anything wrong in the building" he would take the matter up with Sharpe, does not show that he exercised control over the performance of the work. He had a right under the contract to consider with Sharpe the doing of the work in which he, Lipinski, had so important an interest, but his exercise of this right did not divest the general contractor of the control of the building.

In Jefferson v. Jameson & Morse Co., 165 Ill. 138, the Supreme Court said:

"In Scammon v. City of Chicago, 25 Ill. 424, it was held that where an owner of land contracts with a skillful mechanic to erect on the land a building and surrenders the premises to the contractor, the owner is not answerable in damages for an accident which occurs to a stranger passing by, and that if the injured party has any recourse it is against the contractor. In Idau v. Williamson, 63 Ill. 16, it was again held that where the owner of a lot contracts with a skillful and competent builder for the erection of a house and surrenders to him possession of the property, and the work is not done under the direction of the owner, and injury results to a third person from the negligence of the contractor, the latter is not the servant of the owner, and the contractor alone is liable for the injury."

It may well be true that the defendant Lipinski knew that the hoisting machinery was used in the building, but he had no control over it. He had no power to say where it should be placed, how it should be operated, nor in what manner it should be protected. The law did not impose upon him the duty of locking the machinery nor to erect guards to prevent persons, either young or old, from entering the building. This duty rested upon the persons who had the right to the possession of the property and for its negligent performance the owner cannot be held liable. It is our opinion that the building was in the possession and control of an independent contractor. The relation of master and

servant did not exist between Lipinski and Sharpe.

Another question concerns the conduct of the trial Judge in the examination of Lipinski, who testified as a witness in the case. On the trial counsel for plaintiff attempted to show by cross-examination that Lipinski exercised control over the doing of the work upon the building. The trial Judge submitted this defendant to a somewhat lengthy examination, a part of which is as follows:

"Q. You saw it all the while it was being erected, didn't you? A. Oh, yes, I saw it, but I didn't pay very much attention to it.

Q. You went over in the building and looked at what was going on there, didn't you? A. I saw the work sometimes, yes.

Q. You saw the work going on there from day to day?
A. Not every day.

Q. Well, you saw it every day, didn't you? When you passed by there? A. Yes, when I passed by for my luncheon. I never had any other building. This is the only one I ever built.

Q. You were there often and saw what was going on there?
A. Yes, I passed by very near every day.

Q. You saw the way they got the stuff up on the second floor, didn't you? "

Later and following a statement of the witness that he had never seen children playing around the building, the following questions were put by the court and answered by the witness:

"Q. But you lived right there? A. In my business, I was sticking to my business, 9 to 10 o'clock every day.

Q. Well, didn't you think such a thing as that being open in the building would attract the children. A. I know, but I think the contractor ---

Q. (Interrupting) Have you any children of your own?

A. No. I thought that was the contractor's duty. I thought it was supposed to be the contractor's duty, so I did not pay no attention.

THE COURT: Well, it was his duty to look out for that.

Q. Well, did you ever say anything to the contractor

about that? About barricading it up there so the children could not go in there?

MR. LIDTHALL: I object to that, your Honor, and ask for a ruling.

THE COURT: Well, objection overruled.
(To which ruling of the court the defendants and each of them, by their respective counsel, then and there duly excepted.)

Q. Did you ever say anything to the contractor about that, tell him, here, you know you have left that exposed there and a thing like that is attractive to little children and somebody might get hurt in there?

MR. LIDTHALL: I object to that, your Honor, and ask for a ruling.

THE COURT: You say you thought the contractor would look after that?

MR. LIDTHALL: Your Honor, may I have a ruling?

THE COURT: You have your exception, objection overruled and exception.

(To which ruling of the court the defendants and each of them, by their respective counsel, then and there duly excepted.)

Q. You say you thought the contractor was to do that?

A. Yes. I never had experience before like that. I never saw the children in there at all. Maybe for weeks I did not pass by.

Q. If there were little children eight, nine and ten years of age accustomed to go there, by the dozen, running in there and playing there, don't you think you would have known of it and heard of it?

MR. LIDTHALL: I object to that, your Honor.

A. I did not hear it.

Q. And did not know it? A. At the time of the accident I did not know nothing about it."

Clearly the questions of the court intimated that it was the legal duty of the defendant Lipinski to protect children who might enter or be lured into the premises. The error of the trial Judge in the examination of this witness is so apparent that no further discussion of it is deemed necessary.

THE UNITED STATES OF AMERICA
DO hereby certify that

the within and foregoing is a true and correct copy of the original as the same appears in the records of the

Department of the Interior
at Washington, D. C.
this 1st day of January, 1900.

W. A. RORER, Secretary of the Interior.
By _____, Deputy Secretary of the Interior.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the Department of the Interior at Washington, D. C., this 1st day of January, 1900.

W. A. RORER, Secretary of the Interior.

By _____, Deputy Secretary of the Interior.

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at Washington, D. C.
this 1st day of January, 1900.

Other questions presented by the briefs of counsel need not be determined at this time as they may not arise upon another trial of the cause. The judgment being indivisible and being also clearly erroneous, as to at least one of the defendants, must be reversed as to all. The judgment will therefore be reversed and the cause remanded to the Circuit Court of Cook County for a new trial.

REVERSED AND REMANDED.

200 - 25076

2151.A. 646

CARL SPEDBARG,
Appellee,

vs.

JOHN M. BERRY,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COCK COUNTY.

MR. JUSTICE BEVER DELIVERED THE OPINION OF THE COURT.

The plaintiff recovered a judgment in the Superior court of Cock county for the sum of \$671.67, and defendant by his appeal to this court seeks to reverse this judgment.

The suit was based upon a claim for a balance due for services rendered and material and money furnished defendant during a period of years beginning June, 1894, and ending November, 1900. The total amount claimed by the plaintiff in a bill of particulars filed by him was \$4,340.07.

On the trial of the cause the court over objection permitted the introduction of what was known at the trial as Exhibit B, which the plaintiff, who testified by deposition, stated was a copy of an original book of entries and that the copy was made by a young lady from the original book. Plaintiff was permitted to say that the copy, Exhibit B, was a correct copy of this original book. Aside from this exhibit it is almost impossible to deduce from the testimony of the witnesses who testified for plaintiff the state of the account between him and defendant and as the case must go back to the trial court for retrial we do not care to express any opinion as to the probative value of this testimony, except to say that the testimony of the plaintiff is, to say the least, uncertain on the material questions of fact which the jury were called upon to decide.

The trial court erred in admitting Exhibit B in evidence. The evidence shows that this exhibit was made from an

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original book of entry by a young woman stenographer. The plaintiff was unable to tell whether this original book was procurable at the time of the trial. He testified that the original book was lost and he did not know where it could be found, but he did not testify that any effort had been made to find this book and to produce it at the trial. Plaintiff testified that he was present when the exhibit was made and that he assisted in making it. Concerning the original book he said: "Well, I laid it away somewhere, being a long time, 13 years. It must have been moved about a good deal, it must have been lost, I can't tell." He testified that he kept the copy and not the original book because, as he put it, "I didn't need but one book." He further testified that the items in the original book were not copied as they appeared therein; that he thought certain of the items in the copy represented the sum of items in the original book. No proper foundation was laid for the introduction of this secondary evidence of the state of the account between the parties.

The evidence does not show that any diligence was used to produce at the trial the original book from which the exhibit was made, and it is apparent from the testimony of the plaintiff and on the face of the exhibit itself that it was not in all respects a copy of the original book.

It has been held in many cases that it was error to permit a witness to testify as to the contents of an original book of account or to admit copies thereof instead of introducing the original book in evidence when obtainable. Ruggles v. Catton, 50 Ill. 412. The evidence shown in this record does not satisfactorily show that Exhibit B is an exact copy of the original book of account, as insisted upon by counsel for plaintiff.

The judgment of the Superior court is reversed and the cause remanded to that court for a new trial.

REVERSED AND REMANDED.

221 - 25097

DR. CHARLES H. DODGE,
Appellee,

vs.

J. J. NOSER and MRS.
J. J. NOSER,
Appellants.

215 I.A. 646

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants from a judgment of the Municipal court of Chicago in favor of plaintiff for the sum of \$50.00.

The plaintiff is a dentist. A statement of claim supported by affidavit shows that the plaintiff's claim is based upon an open account for services rendered and material furnished by him. The abstract of record fails, however, to disclose that any affidavit of meritorious defense was filed in the cause, although it does show that an affidavit of set-off was filed April 11, 1919, but was stricken from the record September 16, 1918. We are unable to determine from the abstract what issues were presented to the jury. So far as the abstract of record discloses, the trial court would have been justified in entering a judgment in plaintiff's favor without the introduction of any evidence. It is our belief, however, from an examination of the evidence admitted on the trial, that no reversible error was committed by the trial court. There was a direct conflict in the evidence on material questions of fact which were submitted to the jury, and we are unable to say that the verdict of the jury was not warranted by a preponderance of the evidence introduced on the trial. It is also our opinion that no reversible error was committed in the rulings of the trial Judge on the admission of evidence tendered on the trial.

The judgment of the Municipal court is affirmed.

AFFIRMED.

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CORNELIUS J. McCAULIFFE,
Administrator of the
estate of Harry A. Doering,
deceased,

Appellee,

vs.

Appeal from

Superior Court,

Cook County.

THE PEOPLES LIFE INSURANCE
COMPANY, a corporation,
Appellant.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The plaintiff began an action in assumpsit against defendant in the Superior Court of Cook County on an insurance policy.

The declaration filed in the suit alleged that the defendant on September 6, 1915, executed and delivered to insured, Harry A. Doering, a policy of insurance in which defendant agreed to pay to the estate of insured upon his death the sum of \$1,000 upon the terms and conditions recited in the policy. The defendant filed a plea of non-assumpsit to the declaration and gave notice of special matters of defense. Judgment was entered in the trial court on a verdict of the jury in favor of the plaintiff for the sum of \$1,000 and the defendant by this appeal seeks to reverse this judgment.

On the trial of the cause the plaintiff introduced in evidence the policy, certain proofs of death made out on blanks furnished by defendant, and also evidence which tended to show that the defendant refused payment on the policy, giving as a reason therefor that it was not in force.

The principal controversy of fact between the parties at the trial was whether the first year's premium due on the policy had been paid to defendant. The evidence shows that one Gust Linder was agent for defendant at or about

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the time the policy was executed. The insured died in July 12, 1916, about ten months thereafter. Mary Doering, the insured's sister, testified that she paid \$2.00 to Linder and also the first yearly premium due on the policy about September 7, 1915, at which time the policy was delivered to her by Linder as also a receipt which is in words and figures as follows:

"The People's Life Insurance Company
Chicago, September 6, 1915.
Received of Harry A. Doering the sum of \$28.69,
being premium due September 6, 1915 on Policy
No. 10920.

This payment continues policy in force until September 6, 1916, and beyond the last mentioned day a grace of thirty days will be allowed, subject to an interest charge at the rate of five per cent per annum, during which time policy will remain in force.

Fremont Hoy, Secretary."

This receipt including the signature was printed in typewritten form and it bore in the lower left hand corner the words in printing "Countersigned by" followed in writing by the signature "Gust Linder, Chicago, I." Three handwriting experts who testified for the defendant stated that the signature of Linder on the receipt when they examined it in July, 1916, was of a light greenish blue color; that it then appeared to be written in fresh ink and that in their opinion it was placed upon the receipt not more than thirty days before they examined it.

H. A. Nelson, President of defendant company, also testified that no premium or other money had been paid to defendant by the insured or by anyone for him, except \$2.00 which defendant received from Linder. This witness stated that Linder was an agent for defendant "for a short time 1915."

There is no denial of the fact that the policy was executed by the defendant company and that it was delivered by Linder to insured's representative. The receipt in question was on a form provided by defendant and this, together with the policy, was found among the papers of deceased after his death.

THE FIRST TWO YEARS OF HIS LIFE WERE SPENT IN THE
 CITY, WHERE THE HOUSE WAS SMALL, AND THE FURNITURE
 SIMPLE, BUT THE CHILD WAS TAUGHT TO READ AND WRITE
 FROM AN EARLY AGE. HE WAS A VERY INTELLIGENT
 AND SENSITIVE CHILD, AND HIS MOTHER WAS VERY
 ATTENTIVE TO HIS EDUCATION.

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While defendant's president did testify that defendant did not receive the first year's premium due on the policy he made no attempt on the trial to inform the jury of the exact period of Linder's employment as an agent for defendant, nor does it appear that any effort was made to produce Linder as a witness at the trial, or to account for his absence. It is admitted that Linder was an agent for the company for a time during the year 1915. It is conceded that the policy in question was executed by defendant by its proper officers. The uncontradicted evidence is to the effect that the policy and receipt were found among deceased's effects. Under such circumstances the contested question as to whether there had ever been an actual delivery of the policy to insured, or whether the first year's premium was paid within a short time after September 6, 1915, were questions of fact for the determination of the jury.

The defendant must be charged with knowledge of the fact that it had executed the policy and had delivered it to Linder, its agent, and further, that he in turn had delivered it to the insured. If Linder received the first year's premium, as asserted by insured's sister, the defendant was bound by this fact whether it received the premium from him or not. The testimony given by defendant's president at the trial is vague concerning defendant's actual relations with Linder. This witness did not deny that Linder was defendant's duly authorized agent for a time during the year 1915, but he was silent as to whether he, Linder, sustained this relationship toward defendant at the time the policy was issued. Whether Linder in fact did retain the first year's premium to his own use or whether he had a right to do so need not be considered here. It is sufficient to say that the testimony introduced on behalf of defendant in this connection was not in all respects satisfying.

Notwithstanding the testimony of the handwriting

experts, we think there was sufficient evidence introduced upon the trial to sustain the verdict.

In the course of argument to the jury plaintiff's counsel stated:

"The People's Life don't pay anything that they can get out of paying. I say to you that if you or your wife or any of your family has a policy with the company and anything happens to you, and you go down there, or they go down there, they will stand a very slim chance of ever getting anything."

This statement was objected to by counsel for defendant and the court ruled that:

"The statement as to what his wife might do, or what the juror's wife might do, may be stricken from the record."

The language of counsel for plaintiff was improper and went beyond the limits of a fair discussion of facts shown by the evidence.

In Chicago Union Traction Company v. Lauth, 216 Ill. 176, the Supreme Court stated:

"The rule is, that although the trial court may have done its full duty in its supervision of the trial and in sustaining objection, a new trial should be granted where it appears that the abuse of argument has worked an injustice to one of the parties."

In Deel v. Heiligenstein, 244 Ill. 239, the court said:

"Generally, in civil cases, it is only when the amount of the verdict of the jury is large or clearly excessive that such remarks of counsel will require a reversal."

Many important cases have been reversed by courts of review in this and other states for improper and unfair argument by counsel to juries, but notwithstanding the many warnings given and serious losses to litigants occasioned thereby such arguments continue to be made, and in cases where it is evident that recovery on valid claims may be jeopardized thereby. Appel v. Chicago City Railway Co., 259 Ill. 561.

From our examination of the evidence in the record in the present case we are lead to believe that the remarks of

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counsel however improper did not result in prejudice to the defendant. The verdict and judgment was for \$1,000, the sum named in the policy, and the only important question of fact that the jury were called upon to determine was whether Linder was an agent of the company at the time he received the yearly premium due on the policy, and on this question the evidence tendered by the defendant was not in all respects, as stated, satisfactory.

In deciding the case of Chicago City Railway Company v. Creech, 207 Ill. 400, the Supreme Court said in substance that questions as to whether or not a new trial should be granted for misconduct of counsel by way of improper argument to the jury should be left largely to the sound discretion of the presiding judge.

A point is made that proofs of the death of the insured were not duly made in accordance with the requirements of the policy. Evidence introduced upon the trial tended to prove that the representative of defendant denied liability under the policy for the reason that it had never been delivered and was not in force at the time of the insured's death. On the trial counsel for defendant stated to the court "We do not contest the signature, the execution of it, (the policy). Our defense is that it was never delivered, and the premium was never paid."

The defense relied upon at the trial was that the policy never was in force and that no binding contract had been entered into between defendant and insured. No question was raised at any time until the trial as to the sufficiency of the proofs of loss. It is our opinion therefore that, under the circumstances, the proofs offered were sufficient.

In Continental Life Ins. Co. v. Rogers, 119 Ill. 474, the Supreme Court said:

"We regard the doctrine well settled, that where notice and proofs of loss, or of the death of the assured, in the case of a life policy, have been made out and delivered to the company in due time, and they are retained by it without objection, the company cannot, when subsequently sued on the policy, question their sufficiency. Peoria Marine and Fire Ins. Co. v. Lewis, 18 Ill. 553; Hartford Fire Ins. Co. v. Walsh, 54 id. 164; Great Western Ins. Co. v. Stadden, 26 id. 360; Herron v. Peoria Marine and Fire Ins. Co., 28 id. 235. Moreover, it is well settled, that where an insurance company, after a loss has occurred, places its refusal to pay upon some ground not affecting the merits of the case, as, for instance, want of proper notice, all other formal objections not then complained of or pointed out will be regarded as waived. On the same principle, when the claim is, that the policy, for any cause, never became legally binding upon the company and it places its refusal to pay on that ground, it cannot be heard afterwards to urge any mere formal objections to the right of recovery.

The judgment of the Superior Court is affirmed.

AFFIRMED.

MR. PRESIDING JUSTICE MASURELY DISSENTS.

215 I.A. 646

THE CITY OF CHICAGO,
Appellee,

vs.

CHERNBINO JACOBUCCI,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE HOLCOM DELIVERED THE OPINION OF THE COURT.

Defendant was summoned and convicted for violation of sections 2844-2847 of the Revised Municipal Code of Chicago, the complaint alleging that "the defendant while engaged in the meat market business in the City of Chicago, did on to-wit, the 26th day of November, A. D. 1918, at 1609 West Harrison Street, Chicago, Illinois, offer for sale, for delivery in the said city, a certain dressed turkey by avoirdupois weight that was of a quantity less than that represented at the time of the offer for sale to be." He was fined \$25, with the usual order of commitment to the House of Correction to work out fine and costs at the rate of fifty cents a day, imprisonment not to exceed six months if the fine and costs were not paid.

The sections of the ordinance said to have been violated have not been preserved in the record; consequently they are not before us for review, as, although the Municipal court might take judicial notice of the Municipal ordinances, we may not do so, and as said by this court in City v. Tearney, 187 Ill. App. 441:

"Manifestly, therefore, if he omits from the statement thus prepared by him and signed by the trial judge, any matter or thing necessary to enable this court to determine whether the ruling of the trial court was correct, in view of all evidence then before it, the correctness of such ruling is not properly before us for review. In such case, it is our duty to presume that the facts omitted were sufficient to justify the ruling of the trial court. For these reasons, the omission of the full text of the ordinance in question requires us to assume that among its provisions the trial court found language supporting its construction of the ordinance, as given to the jury in the instruction complained of." City v. Baker, 157 Ibid 130.

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In City of Chicago v. Kohn, 195 ibid 399, the late

Mr. Justice Baker said, in delivering the opinion of the court:

"Plaintiff in error has not incorporated in the stenographic report the ordinance referred to in the complaint by number only. The statute provides that the Municipal court shall take judicial notice of ordinances, but this court can not do so. If the plaintiff in error desired to preserve for presentation to this court the question whether the court could from the evidence properly find defendant guilty of a violation of Section 2012 of the Municipal Code, the section mentioned in the complaint, he should have incorporated that section into the stenographic report. Chicago v. Tearney, 187 Ill. App. 441; Chicago v. Moran, 193 Ill. App. 57."

The evidence in the record in the absence of the ordinance sustains the conviction of the offence charged in the complaint. By going to trial without objection to any informality in the summons, the informity, if any there be, is cured. Defendant was in court in his own proper person, represented also by counsel, and thereby submitted himself to the jurisdiction of the court. This was sufficient to give the court jurisdiction to try the case.

As the proof is, in the absence of the ordinance, sufficient to sustain the conviction, the judgment of the Municipal court is affirmed.

AFFIRMED.

THE UNITED STATES OF AMERICA

DEPARTMENT OF THE INTERIOR

BUREAU OF LAND MANAGEMENT
WASHINGTON, D. C. 20250
OFFICE OF THE ASSISTANT SECRETARY
FOR LAND MANAGEMENT
1015 NINTH STREET, N.W.
WASHINGTON, D. C. 20004
TELEPHONE (202) 755-1200
FACSIMILE (202) 755-1200
MAILING LIST

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234 - 25111

EDWARD E. ESCH,
Appellee.

vs.

E. J. SCHAGAR,
Appellant.

215 I.A. 647
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE HOLDEN DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment against him in favor of plaintiff for \$515 on a submission of the cause for trial by the court.

Defendant ordered from plaintiff one Simplex Crane Chassis, which he paid for. He likewise ordered a seven passenger Kimball limousine body at the price of \$2100 and a leather Victoria top at the price of \$400; these he neither took nor paid for.

The controversy arises upon the liability of defendant for damages to plaintiff arising from defendant's failure to take the limousine body and Victoria top at the prices agreed upon. The real question rests in the measure of damages, if any, plaintiff is entitled to recover under the law.

It is admitted that the prices fixed for the Victoria top and limousine body are standard prices, and defendant contends that as there is no difference between the contract value and the market value of the limousine body and Victoria top, plaintiff has not suffered any damage recoverable in an action at law.

Plaintiff contends that the goods were contemplated to be bought from a manufacturer from whom he would receive a commission in the amount of the judgment, and that as defendant failed to take and pay for the limousine body and Victoria top according to his agreement, this commission is the measure of his damages for defendant's breach of his contract. It is stipulated that unless plaintiff is entitled to a commission from de-

fendant, under the agreement, of 20 percent on \$2400 for the limousine body and \$400 for the Victoria top, plaintiff is not entitled to recover anything in this cause.

It would seem from the facts admitted, the contract price and the market price at the time of the breach being the same, that it is in law a case of damnum absque injuria, for which the law provides no remedy. The rule of law regarding the measure of damages where the purchaser of goods sold at a specific price refuses to pay for them, is stated as follows in Bagley v. Findlay, 82 Ill. 524:

First. That the vendor may store them for the vendee, give him notice that he has done so, and then recover the full contract price.

Second. He may keep the goods and recover the excess of the contract price over and above the market price of the goods at the time and place of delivery; and

Third. He may, upon notice to the vendee, proceed to sell the goods to the best advantage and recover from the vendee the loss if they fail to bring the contract price. And the court said:

"In this case there is no pretense that the plaintiff is seeking either the first or third remedy. He is, in fact, confined to the second and when this remedy is pursued the measure of damage is specifically fixed at the difference between the contract price and the market value of the goods." Sanborn v. Benedict, 78 *ibid* 309.

So, in the instant case, plaintiff's rights are confined to the second remedy, and as there is no excess of the contract price over and above the market price of the limousine body and Victoria top, there are no damages awardable.

Plaintiff invokes Sec. 64 of Part 5 of Chap. 121-A, R. S., known as the "Sales law." We cannot say that the Sales law supra changes the principle of law regarding the assessment of damages as laid down in cases supra. In fact, Subdivision 3 of Sec. 64

would seem to control in the instant case, and in this regard is but an enactment of the law as laid down by the decisions of our Supreme court at the time of its passage. This subdivision provides.

"Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances, showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or if no time was fixed for acceptance, then at the time of the refusal to accept."

Neither under the statute nor the decisions supra has plaintiff made out a case entitling him to an assessment of damages for the admitted breach of the order regarding the limousine body and Victoria top; therefore the judgment of the Municipal court is reversed with a judgment of nil capiat and for costs in this court.

REVERSED WITH JUDGMENT OF NIL CAPIAT
AND FOR COSTS.

251 - 25128.

WHITTAKER GUNSMITH CO.,
a corporation,

appellee,

vs.

MATHEWSON CO.,
a corporation,

appellant.

215 I.A. 647

MR. JUSTICE ANDERSON delivered the opinion of the court.

Plaintiff had judgment, upon the verdict of a jury, for \$3990.67, and defendant brings the record to this court for review.

The amount of the judgment is the amount claimed by plaintiff to be due from defendant for a quantity of galvanized sheets contracted by plaintiff to be sold to defendant upon certain terms as to price, about which there is no contest.

Defendant seeks to escape liability for the reasons set forth in its affidavit of defense, which are, in substance, that about October 19, 1917, the parties entered into a contract for the sale and delivery of certain galvanized sheets, delivery to be made by plaintiff to defendant within four or five weeks from the date of making the contract; that plaintiff did not before commencement of the suit or since make delivery of the sheets to defendant as provided by the contract; that because of failure to make such delivery defendant on December 24, 1917, gave notice of the cancellation of the contract on that ground and sought thereby to terminate and cancel the contract; further, that no delivery of the sheets was made to the carrier on December 24, 1917, but not until December 29, 1917; that no delivery thereof was ever made to defendant at any time and that

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the goods set forth in plaintiff's claim are not the goods contracted for and that the same were never accepted or received by defendant.

The order was for 2310 galvanized sheets, which plaintiff on December 28, 1917, loaded on cars at its warehouse at Martins Ferry, West Virginia, and they were routed for Chicago via Wheeling Terminal and started on their journey at ten thirty on the evening of December 28, 1917. The cars were delivered to the Pennsylvania Railroad Company. The next day was Sunday and on the Monday following plaintiff made out a bill of lading and sent it to the Pennsylvania Company, which company notified plaintiff by telephone that on that morning an embargo had been placed upon shipments of our load freight from Martins Ferry to Chicago. Plaintiff endeavored to have the Pennsylvania Company send the shipment forward notwithstanding the embargo, but it would not. The only way open to plaintiff to send the shipment forward to Chicago was by way of the Baltimore & Ohio Railroad. To that end plaintiff instructed the Pennsylvania road to turn over the shipment to the Baltimore & Ohio, which was done. However, the embargo caused a delay so that the shipment did not get started on the Baltimore & Ohio until December 29, 1917. In thus changing the routing plaintiff acted within a certain provision of the sales contract, which reads:

"The seller is entitled to select the routing for all goods sold f. o. b. mill without freight allowance; the buyer is entitled to select any routing officially authorized and published by transportation companies, provided, he advises the seller of such routing at the time of placing the order or specifications. The seller reserves the right, however, to select the initial line, if inability to secure cars promptly, or for other reasons, would involve delay in forwarding the goods over the route selected by the buyer."

Defendant was duly notified of such routing.

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Another provision in the contract is that "The place of delivery under the contract is f. o. b. railroad cars at the seller's works for shipment to Chicago."

Under these terms, when the sheets were loaded on the cars and started on the way to Chicago, the title vested in defendant. The telegram of defendant to plaintiff of December 24th in an attempt to cancel the contract came too late to effect a change of ownership in the circumstances which then prevailed.

Complaint is made that the sheets shipped were not according to contract. There is abundance of evidence on the part of plaintiff that the sheets shipped fulfilled contract requirements and as defendant refused to receive the sheets or examine them as to either quantity or quality, its contention to the contrary is abortive. Furthermore, variations in weight were permissible, according to the express letter of the contract, to the extent of two and one-half percent. The claimed variation was within the contract limit and consequently in this regard defendant has no just cause of complaint.

There is a quibble in regard to whether a bundle should contain six or seven sheets. In the light of the proofs, we cannot see that defendant's rights are in any respect affected, whichever number of sheets should be arbitrarily comprised in a bundle, as defendant was furnished with the full number of sheets bargained for within the variations permitted by the contract. The jury have no doubt and we are inclined to concur in their finding. Where there is a contrariety of evidence, and the facts and circumstances by a fair and reasonable intendment sustain the verdict, such verdict will

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not be disturbed on review when the evidence of the successful party, as in the case under consideration, considered by itself, is clearly sufficient to sustain the finding. Birlin v.

Chittenden, 176 Ill. rep. 359; Ill. Life Ins. Co. v. Linley,

110 ibid 161; Springfield Can. & Co. v. Feiser, 130 ibid 46;

Backley v. Backley, 151 ibid 332; Shevalier v. Seager, 121 Ill. 564.

The questions of whether plaintiff had breached the contract by failing to make deliveries within the time specified in the contract or in changing the routing from the Pennsylvania to the Baltimore & Ohio Company were equally questions of fact for the jury, whose findings are amply supported by the proofs.

The contract regarding delivery was "at seller's earliest practical convenience," and the qualifying words "probably four or five weeks" inhibit any inference of guarantee as to time. The jury were justified in concluding, as they did by their verdict, that the shipment was made in a reasonable time within the meaning of the contract and that such time was within "seller's earliest practical convenience." The evidence showed that the government of the United States, owing to the war, consumed enormous quantities of steel and iron, that operating conditions were much disturbed, the railroad freight traffic much congested, and that earlier shipment to defendant could not have been made under existing conditions without crowding out of order other contracts. This the terms of the contract did not require.

Defendant attempted to cancel the contract because of failure to deliver the goods within the time specified in the contract. Upon the trial it attempted to defeat a recovery on

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the ground that the shipment did not conform in quantity to that contracted for. It is the law that where refusal to perform a contract is based on one specified ground another ground for such refusal cannot be urged as a defense upon the trial.

In Ohio & Miss. Ry. Co. v. McFarthy, 26 U. S. 280, the principle was laid down thus:

"Where a party gives a reason for his conduct and decision touching anything involved in the controversy, he cannot, after litigation was begun, change his ground and put his conduct upon another and different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law."

Schuyler Co. v. Missouri P. & I. Co., 235 Ill. 349; Gibson v. Brown, 214 *ibid* 330.

We find no reversible error in the court's rulings upon the evidence or the instructions, and the judgment of the Municipal Court is affirmed.

AFFIRMED.

215 I.A. 647

LEICOLD CORREN IRON COMPANY,
a corporation,

Appellee,

vs.

THE LORAINETRAL COMPANY,
a corporation,

Appellant.

APPEAL FROM JUDICIAL COURT
OF CHICAGO.

MR. JUSTICE HOLMES DELIVERED THE OPINION OF THE COURT.

On a trial before the court without a jury there was a finding for defendant and a judgment of nil capiat, from which plaintiff appeals.

Plaintiff is a dealer in scrap iron, at times handling other metals. Defendant is in the business of rubber reclaiming at wholesale and the refining, smelting and production of brass, copper and aluminum ingots and the jobbing of different grades of drosses. It did not smelt drosses and had no facilities for analyzing or testing.

Plaintiff's claim, as set out in its statement, was for 28,200 pounds of babbit dross, which it sold and delivered to defendant about August 27, 1918, at 5 cents a pound; that there was due it therefor the sum of \$1410. Defendant's contention by way of defense is that the babbit dross was sold to it by sample and that the dross delivered was not up to the grade of such sample, was wholly unlike it and of a much lower grade; that defendant notified plaintiff of the fact and requested shipping directions so that the dross might be returned to plaintiff at its place of business, which directions plaintiff refused to give and insisted upon payment; that defendant attempted to make delivery of all of the dross to plaintiff at its place of business, but such attempt was thwarted because plaintiff refused to receive the same, and that defendant holds the dross for plaintiff.

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It is apparent that the decision of this case rests upon our determination of the fact as to whether the dross delivered was substantially in quality up to the sample furnished by plaintiff to defendant and in faith of which defendant consented to purchase the dross.

The court could reasonably find from the evidence that the original sample furnished showed 78 per cent of free metal, while the bulk showed but 36 per cent. The evidence showed that samples from the bulk were examined by several metal experts, as was also the original sample submitted by plaintiff to defendant in faith of which the purchase was made, and these witnesses testified that while the sample showed 78 per cent of free metal, the bulk sample showed but 35 per cent.

The court allowed defendant to file an amended affidavit of merits during the course of the trial. This plaintiff insists was error because of a lack of any showing of mistake or oversight. However that may be, we think that it was an exercise of sound judicial discretion for the court to permit the filing of the amended affidavit of merits; and that even had the court abused such discretion by permitting the filing of the amended affidavit of merits, still, in the light of the evidence which we are constrained to hold was admissible under the affidavit of merits then on file, the defense that the bulk of the dross was not up to the sample was sustained.

Plaintiff contends that proof by defendant is lacking that it offered to return all of the dross delivered by plaintiff. The record shows there was an offer to return and a refusal on the part of plaintiff to accept. In this condition, defendant was relieved from any further responsibility to return the dross.

While defendant furnished proof showing that the gross weight delivered to the Midland Metal Company was less by

1200 pounds than the gross weight received by defendant from plaintiff, (defendant having arranged to sell the dross to the Midland Metal Company if it were according to sample, said company rejecting it because it was not up to sample) still there is nothing from which this court would have a right to assume that defendant was not in a situation to have re-delivered the full amount of the dross to plaintiff had plaintiff been willing to accept it.

It is axiomatic that the plaintiff must maintain his case by a preponderance of the evidence, and if the sale was by sample an essential fact for plaintiff to prove was that the bulk was up to sample. The burden of proof is always on the plaintiff and never shifts, although it may be overcome by countervailing proof.

Furthermore, we are satisfied from the evidence that defendant proved its defense by a clear preponderance of the evidence, and as its defense was an affirmative one, its proof fulfilled legal requirement.

The evidence establishes that the bulk of the rabbit dross sold was very inferior to the sample furnished in the faith of which the purchase was made. We quite agree with the trial Judge in his reply to a contention on the part of plaintiff's counsel that he had established his case by a preponderance of the evidence, in which the court said: "Well, I hold you have not. Hearing for three days witnesses who have no interest in this litigation one way or another, hearing the admissions I have heard, having seen all the witnesses and taken into consideration all the circumstances, I could not come to any other conclusion." Nor can we.

There is no error in the record before us, and the judgment of the Municipal court is affirmed.

AFFIRMED.

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*Ref. denied
Nov. 2, 1917*

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and nineteen the same being the 25th day of March in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. Franklin H. Boggs, Justice

CHARLES C. JOHNSON, Clerk.

Hon. J. C. Eagleton, Justice.

(Appointed April 4th 1919)

GRANT HOLCOMB, Sheriff

And afterwards, to-wit; On the sixth day of June, A. D. 1919, there was filed in the office of the Clerk of said Court. at Mt. Vernon, Illinois, an OPINION in the words and figures following:

John L. Anselment,

Defendant in Error

215 I.A. 647

ERROR TO
APPEAL FROM

No. 20

MARCH TERM, 1919.

vs.

Circuit COURT

Hamilton COUNTY

Louisville & Nashville R. R. Co.,

Plaintiff in Error

TRIAL JUDGE

HON.

JULIUS C. PERM

Term No. 20.

Agenda No. 10

March Term, 1919.

John L. Anselment,

Defendant in error

v.

Louisville & Nashville Railroad
Company,

Plaintiff in error.

215 L.A. 647

Error to Hamilton.

Opinion by Justice, J. J.

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John L. Anselment, defendant in error, brought suit against the Louisville and Nashville Railroad Company, plaintiff in error, to recover damages for personal injuries, in the circuit court of Hamilton County, Illinois. The case was tried with a jury, a verdict assessing defendant in error's damages at \$500 was rendered, motions for new trial and in arrest of judgment were denied, judgment was rendered on the verdict and the cause was brought to this court on writ of error.

The declaration consists of four counts charging negligence on the part of the persons in charge of plaintiff in error's train to which was filed the general issue. At the conclusion of the evidence on the part of the defendant in error and again at the conclusion of all the evidence, plaintiff in error moved the court to instruct the jury to find a verdict in its favor, which motions the court denied. The errors assigned are the refusal of the court to give said peremptory instructions, the refusal to give certain instructions offered by the plaintiff in error, the refusal to grant a new trial and the entering of judgment on the verdict.

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Defendant in error, a man about 65 years of age, was a passenger in the smoking car, on plaintiff in error's train, from Belafield to McLeansboro, where he intended to take a train to Shawneetown. While there is some conflict in the testimony it appears that as the train approached McLeansboro a flagman announced, "McLeansboro next stop, change cars for Eldorado, Equality and Shawneetown". A little later that announcement was repeated and the flagman went to the exit of the passenger coach in which defendant in error was riding, opened the door, was followed by passengers, including the defendant in error, when he announced, "all out for McLeansboro", and thereupon defendant in error went out on to the platform, down the steps of the coach and stepped to the ground. This happened before the station was reached and while the train was gliding smoothly along at perhaps fifteen miles an hour. The injury occurred about seven o'clock in the evening, September 17, 1918 and it was dark at that time. Defendant in error thought the train had reached the station, had stopped and that he was invited to alight by the flagman. He was thrown against the ground under a car of another train on a side track adjacent to the main line. His face was cut and bruised, his nose broken, shoulder blade injured, head cut and he was otherwise injured and did not reach his home for twenty-eight days. He was prevented from performing manual labor up to the time of the trial and had paid out considerable money for doctor bills and board while away from home.

Plaintiff in error relies upon Busack v. Chicago City Railway Co., 283 Ill. 117 in support of its contention that it was not guilty of negligence. In that case plaintiff was a passenger on a car of defendant which had an inclosed vestibule at the front end, with a door therein on

the side, which defendant kept closed, except when the car was standing and passengers were passing out. The door was held closed by a latch and appliances in the control of and operated by the motorman, who unfastened the door when the car came to a stop at a point where passengers were to be discharged. As the car approached the intersection of sixth-fourth street and Cottage Grove avenue plaintiff, who was riding in the vestibule informed the motorman that he desired to alight at sixty-fourth street. In approaching the crossing the motorman reduced the speed to stop the car and permit plaintiff to alight, and as the car was coming to a stop, and before it stopped, the motorman unfastened the door. Plaintiff then opened the door, stepped from the car, supposing it had stopped, and was thrown violently to the ground and injured. It will be observed that in that case no announcement was made or invitation or order given by defendant to the plaintiff for him to alight and that the plaintiff himself opened the door. The court held negligence was not shown and that a verdict of not guilty should have been directed. In the case at bar the flagman, the servant of the plaintiff in error, opened the door, made three announcements, the last of which could reasonably be taken as an invitation, if not an order, to alight, following which the defendant in error, thinking the train had stopped, it being dark, alighted. In view of the difference in the facts in the Busack case and the case at bar and the difference in the manner of the operation of a street railway and a steam railroad and the opportunity to alight from a street car at frequent intervals, we conclude that the Busack case is not in point and does not sustain the contention of plaintiff in error. The jury was warranted in concluding that the conduct of the flagman might reasonably be

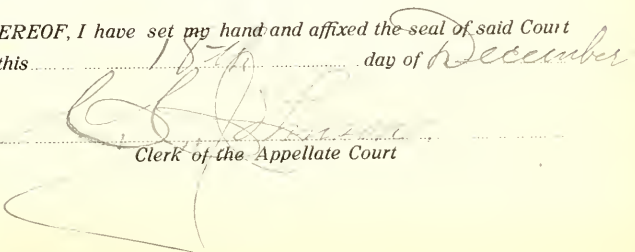
considered by defendant in error, under all the facts and circumstances, as an invitation to alight and that plaintiff in error was guilty of negligence. Misdirections by persons in charge of a train as to the proper place for passengers to get off, will render a carrier liable to one who, acting in reasonable reliance on the directions given, is injured. 10 Corpus Juris 1140. Applying the reasoning of the court in N. & O.S.W.R.R.Co., v. Bullen, 217 Ill.203 and U.A.A.R.R.Co. v. Gore, 202 Ill.188, we conclude that the conduct of the defendant in error at the time of the injury was not negligence per se and that whether or not attempting to get off of the train, while the same was in motion, on the occasion in question, was such contributory negligence as would bar a recovery, was a question of fact to be determined by the jury, in view of all the attending circumstances.

Plaintiff in error complains because the court refused the following instructions. "The court instructs the jury that while the law permits the plaintiff to testify in his own behalf, nevertheless the jury have the right in weighing his evidence and determining how much credence is to be given his evidence, to take into consideration the fact that he is the plaintiff and his interest in the result of the suit, and to what extent, if any, the evidence of the plaintiff has been influenced by his interest in the result of the suit." The refused instruction did not contain the necessary safeguard that the jury "should judge the weight of his testimony by the same tests applied to other witnesses, "as announced in Dickerson v. Henrietta Coal Co., 251 Ill.292 and was properly refused by the court. The facts are disputed but it was the province of the jury to determine the credit and weight to be given the evidence and we cannot say that the verdict was manifestly contrary to the same. Finding no reversible error in the record the judgment of the circuit court will be affirmed.

Not to be reported in full. -4- Affirmed.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 18th day of December
A. D. 1917


Clerk of the Appellate Court

OPINION

Per. §

7127

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and nineteen the same being the 28th day of October in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.

Hon. J. C. Eagleton, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

GRANT IRVIN, Sheriff

And afterwards, to-wit; On the seventh day of November, A. D. 1919, there was filed in the office of the Clerk of said Court. at Mt. Vernon, Illinois, an OPINION in the words and figures following:

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Union Trust and Savings Bank,

Appellee

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vs.

No. 9

MARCH TERM, 1919.

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John C. Hall et al,

Appellants

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215 I.A. 648

ERROR TO
APPEAL FROM

City COURT

East St. Louis COUNTY

TRIAL JUDGE

HON. H. L. BROWNING

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 18th day of December
A. D. 1917

Clerk of the Appellate Court

OPINION

FEE, \$

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and nineteen the same being the 28th day of October in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.

Hon. J. C. Eagleton, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

215 I.A. 648

GRANT IRVIN, Sheriff

And afterwards, to-wit; On the seventh day of November, A. D. 1919, there was filed in the office of the Clerk of said Court. at Mt. Vernon, Illinois, an OPINION in the words and figures following:

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The People, ex rel. Marie Goodwin,
Appellee
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vs.
No. 13
MARCH TERM, 1919.
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Harry Gregory,
Appellant
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ERROR TO
APPEAL FROM

County COURT

Wayne COUNTY

TRIAL JUDGE

HON. J. v. LEIDINGER





I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 18th day of December
A. D. 1919

Clerk of the Appellate Court

OPINION

FEE'S

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and nineteen the same being the 28th day of October in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.

Hon. J. C. Eagleton, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

GRANT IRVIN, Sheriff

And afterwards, to-wit; On the seventh day of November, A. D. 1919, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

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Fred Ulen,
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Defendant in Error
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vs.
No. 18
MARCH TERM, 1919.
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Hugh Mason,
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Plaintiff in Error
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215 I.A. 648

ERROR TO
APPEAL FROM

Circuit COURT

Pulaski COUNTY

TRIAL JUDGE

HON. D. T. HARTWELL

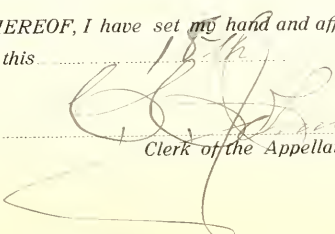
There was no objection to the jury's conclusion on the part of plaintiff in error that the court's ruling proper or admitted improper testimony. The finding is strongly urged for reversal being that the verdict is contrary to law and the evidence. We have considered the arguments given by the court and they seem to us to be based on a complete misapprehension of the facts of the case and on a complete misapprehension of the law. There is no error committed in the testimony on any points. When defendant in error was first sworn as plaintiff in error were counting the cattle there were fifteen. There is no testimony to the effect that the original ran by defendant in error, which may have been stated true, and it is possible that the jury took the view that plaintiff in error, or his hired man, or both, knew that there were only fifteen head and yet they permitted the defendant in error to proceed on the theory that there were fifteen, and thereby introduced into evidence that there were fifteen head when there were but fifteen. It is clear from the evidence presented in error that the jury was misled by the testimony of the defendant in error that there were fifteen head and that the jury concluded there were but fifteen head and that the plaintiff in error knew there were but fifteen head and killed the defendant in error who was in fact there but fifteen head, there was evidence in the record tending to justify them in reaching that conclusion.

Plaintiff in error claimed that the defendant in error knew how many cattle there were, but the court ruled that the defendant in error could not know, that the trial was completed when the check was cashed, that when defendant in error found that he could not sell the cattle he arranged with plaintiff in error to keep them a few days, not to sell and drive



I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 18th day of December
A. D. 191


Clerk of the Appellate Court

OPINION

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and nineteen the same being the 28th day of October in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.

Hon. J. C. Eagleton, Justice.

Hon. Harry Hugbee, Justice.

CHARLES C. JOHNSON, Clerk.

GRANT IRVIN, Sheriff

And afterwards, to-wit; On the seventh day of November, A. D. 1919, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

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Mary...kovitz et al.....
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Appellants.....
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vs.
No. 21.....
MARCH TERM, 1919.
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Mathias Henderson et al.....
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Appellees.....
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215 I.A. 648

ERROR TO
APPEAL FROM

Circuit COURT

Madison COUNTY

TRIAL JUDGE

HON. GEORGE A. CROW



I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 18th day of December

A. D. 1919.

Clerk of the Appellate Court

OPINION

LEE, S

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and nineteen the same being the 28th day of October in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.

Hon. J. C. Eagleton, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

GRANT IRVIN, Sheriff

And afterwards, to-wit: On the seventh day of November, A. D. 1919, there was filed in the office of the Clerk of said Court. at Mt. Vernon, Illinois, an OPINION in the words and figures following:

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Mark Leyerstein,
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Defendant in Error
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vs.
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No. 25
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MARCH TERM. 1919.
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St. Louis Merchants Bridge Terminal
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Ry. Co.,
.....
Plaintiff in Error
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215 L.A. 648

ERROR TO
APPEAL FROM

City COURT

Granite City COUNTY

TRIAL JUDGE

HON. H. R. CULIVAN

Frank Eyerstein,

Defendant in error

215 I.A. 648

v.

Chicago and North Western
Railway Company,

Plaintiff in error

Plaintiff in error

Opinion of the Court.

This is an action for damages for personal injury, brought by the plaintiff against the defendant. The plaintiff claims that on or about the 1st day of December, 1917, at Chicago, Illinois, he was injured by the defendant's negligence. The defendant denies the plaintiff's claim and alleges that the plaintiff was contributorily negligent.

The facts of the case are as follows: On or about the 1st day of December, 1917, at Chicago, Illinois, the plaintiff was driving a motor car on the city street. He was traveling west on Avenue A, which is a north-south street, towards Avenue B, which is an east-west street. At the time of the accident, the plaintiff was traveling at a speed of about 15 miles per hour. He was approaching a cross street, Avenue C, which intersects Avenue A at a right angle. At the time of the accident, the plaintiff was within about 20 feet of Avenue C. At that time, a motor car, owned and driven by the defendant, was traveling east on Avenue C. The defendant's car was traveling at a speed of about 15 miles per hour. The two cars collided at the intersection of Avenue A and Avenue C. The plaintiff's car was struck on the side and was thrown into the air. The plaintiff was thrown from the car and was injured. The plaintiff claims that the defendant was negligent in that he was traveling at an excessive speed and that he failed to stop in time to avoid the collision. The defendant denies the plaintiff's claim and alleges that the plaintiff was contributorily negligent in that he was traveling at an excessive speed and that he failed to stop in time to avoid the collision.

The plaintiff is entitled to recover damages for personal injury. The case was tried before a jury, and the jury returned a verdict in favor of the plaintiff. The judgment rendered on that verdict is affirmed.



It is contended by counsel for plaintiff in error that the evidence does not support the verdict and that the damages awarded are excessive. No question is made as to instructions or rulings on the admission of evidence, consequently it must be taken that the questions at issue were fairly submitted to the jury.

It is claimed by counsel for defendant in the operation of a vehicle that it was necessary at times to drive over curbs, across a street and block the curb of the street for an unreasonable length of time, or in violation of some ordinance in the city. There is no requirement as to blocking the street or any violation of blocking the street for an unreasonable length of time or in violation of any law or ordinance as to driving over the curb in this case. The court is evidently concerned to ascertain this objection as to the fact of obstruction of way but this objection is not applicable to the facts of the instant case. The facts show that the blocking of the avenue in this instance was not necessary to the position of plaintiff in error's vehicle. As the defendant the testimony of plaintiff in error is not sufficient to show that even their intention that the car should block the avenue, that fact being the result of a relative emergency and the car was moving in the direction of the curb. After the car was across the street, it was very suddenly lost there without any light or signal of any kind. The declaration charges that my reason of the defendant's negligence, carelessly and irresponsibly leaving said coal car in the right time upon sixteenth street and across Madison Avenue, without any notice or warning whatever, plaintiff drove his automobile into and against said coal car and the negligence of

plaintiff in error under this allegation was clearly established by the proofs.

There is no other basis of recovery as to another defendant in error who at all times was in a state of silence. That section of the bill is not sustained as it is based on error's negligence, and a new trial is granted as recommended by the jury. It is testified that on a driving school for 14 miles on your road to a new place in or about 1914. One of the railroad men testified defendant in error is tied to the road and been working on the road at the present. It is testified in error's testimony, and a new trial, that he had been driving, and defendant in error was driving, the defendant, and he had been driving in a direct to the road to the present of the road and the working. It is not necessary to say that to this question the verdict was against the defendant in error on the evidence.

It is not shown that in error's testimony to have his own appearance and the charges on error is a fact that in an accident and a condition of the road where the accident occurred in error is the defendant in error's testimony that ten or more years ago he had been in a condition of the road about the injury to his head, but it is not shown that the whole case is a new trial.

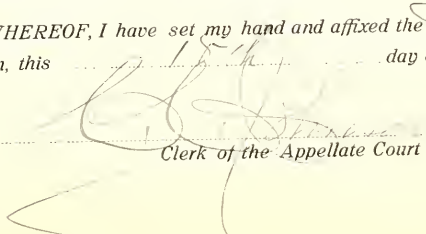
The judgment will be affirmed.

RECORDED.

Not to be reported in 1911.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 18th day of December
A. D. 1917.


Clerk of the Appellate Court

OPINION

FEE, \$

777.2

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and nineteen the same being the 28th day of October in the year of our Lord, one thousand nine hundred and nineteen.

Present:

- Hon. Franklin H. Boggs, Presiding Justice.
- Hon. J. C. Eagleton, Justice.
- Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

GRANT IRVIN, Sheriff

And afterwards, to-wit; On the seventh day of November, A. D. 1919, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

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Farmers State Bank of Brookport,
Illinois, Appellant
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.....
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vs.
No. 40
MARCH TERM. 1919.
.....
.....
R. C. Leeper et al,
Appellees
.....
.....

215 I.A. 649

ERROR TO
APPEAL FROM

..... Circuit COURT

..... Massac COUNTY

TRIAL JUDGE

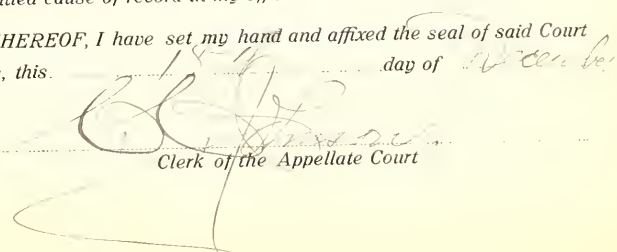
HON. D. T. PARTWELL



I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this day of December,

A. D. 1917


Clerk of the Appellate Court

OPINION

FEES

77501

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and nineteen the same being the 28th day of October in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.

Hon. J. C. Eagleton, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

GRANT IRVIN, Sheriff

And afterwards, to-wit; On the seventh day of November, A. D. 1919, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

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Lenora Turner, formerly Lenora

Smith, Appellee

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vs.

No. 44

MARCH TERM, 1919.

.....

.....

Jack Halstead et al,

Appellants

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215 I.A. 649

ERROR TO
APPEAL FROM

Circuit COURT

Franklin COUNTY

TRIAL JUDGE

HON. K. E. HICKMAN

dictory statements of appellee's witnesses as to the time in the day purchases were made of appellant, appellant, and appellant's testimony that he was not in the basement on the day in question, the verdict as against appellant is contrary to the evidence, and if the verdict cannot be sustained as against him, it must stand or fall with the appellant's wife. The evidence shows that appellant had formerly conducted a saloon in a room of the building over the basement, still owned a small interest in the building, and had recently received large shipments of intoxicating liquors, although no licensed saloons were being operated in any way at this time. Appellant testified that he was agent for a brewery company, and that these shipments of liquors had been purchased through his company agent, and were later shipped to the purchaser at the roller mine. While the testimony of certain of the witnesses is somewhat contradictory in some details, yet in view of the fact that it is clear cannot hold that the verdict of the jury which heard the witnesses testify and had the opportunity of observing their demeanor on the witness stand, is so seriously against the weight of the evidence, that it should be set aside.

The admission of the receipt received in evidence was not error. There is a small village, and no licensed saloons were permitted there at this time. Appellant had formerly and was later owner of a saloon there. These receipts were properly admitted as a circumstance showing that he was receiving liquor which he undoubtedly sold as charged, or was engaged in the business of selling the same.

The instruction requested of the court follows: "The court instructs the jury that if you find from a preponderance of the evidence that plaintiff's husband died in consequence of intoxication produced by sales or gifts of intoxicating

liquors sold or given to him by the defendants, then the law presumes that Plaintiff, his wife, was injured in her means of support by reason of his death." The court contend this instruction left the jury free to find the defendants guilty if they believed deceased "shall be relieved in any manner from his intoxication, whereas under the allegations of the declaration it is claimed Plaintiff can recover only if the words were deceased's death resulted from the fall from the stairway as a result of his intoxication. An examination of the declaration shows that the last count does not mention the fall, but that the charging part thereof is as follows: "that the said defendants and each of them as aforesaid and being so engaged as aforesaid, did then and there on the day aforesaid sell and give intoxicating liquor to him the said Charles Smith and thereby caused the intoxication of him the said Charles Smith as aforesaid, in whole or in part and while he, the said Charles Smith, was so intoxicated as aforesaid and so caused as aforesaid, and in consequence of the said intoxication, the said Charles Smith lost his life," etc.

Consequently even though counsel's contention is well taken the instruction is proper under that count. This instruction was given on about fairly to advise the jury that, in absence of proof to the contrary, proof of deceased's death as a result of intoxication produced by liquors sold or given him by defendants, raised a presumption of injury to Plaintiff's means of support. A similar instruction was held not to be substantial error by the supreme court in *Wynn v. Bogart*, 110 Ill. 243.

It also fully appears from the record that the case was tried upon the theory that the death of Charles Smith resulted from his fall down the stairway and there was no

claim or proof that it resulted from any other cause,
so the jury could not possibly have been misled by said in-
struction. The judgment of the trial court will be affirmed.

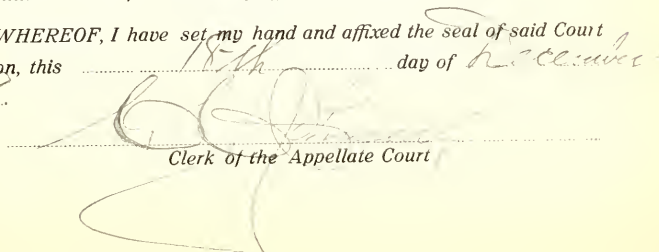
Reversed.

Not to be reported in 1917.



I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 18th day of December
A. D. 1917


Clerk of the Appellate Court

OPINION

FEE, \$

3

777

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and nineteen the same being the 28th day of October in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.

Hon. J. C. Eagleton, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

GRANT IRVIN, Sheriff

And afterwards, to-wit; On the seventh day of November, A. D. 1919, there was filed in the office of the Clerk of said Court. at Mt. Vernon, Illinois, an OPINION in the words and figures following:

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Catherine Ryan et al,.....

Appellees.....

.....

.....

vs.

No. 5C.....

MARCH TERM, 1919.

.....

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Clemens Vanling et al,.....

Appellants.....

.....

.....

215 I.A. 649

ERROR TO

APPEAL FROM

..... Circuit COURT

..... Birmingham COUNTY

TRIAL JUDGE

HON. HON. THOS. L. JETT

Catherine Ryan et al,

Appellees

v.

Clemens Vahling et al

Appellants

215 1.A. 649

Appeal from Effingham.

Opinion by Justice, J. J.

In December 15, 1914, a judgment for \$589.75 and \$20.50 costs was secured by appellees, Catherine Ryan, Wm. Friesner, C. F. Denton, Assignee, Henry Fietner, Harry Fietner and Bertha Fietner, against Clemens Vahling, one of the appellants.

The judgment was for the deficiency resulting from a re-sale of certain real estate, which said Clemens Vahling had bid in at a former master's sale, which, he having failed to comply with the terms of sale, was sold a second time by order of the court at his risk. Several executions were issued on the judgment, but were all returned unsatisfied. On October 11, 1918, complainants filed a creditor's bill against Clemens Vahling, Mary Vahling, Frank Vahling, Harmon Vahling, Joseph Vahling and Teutopolis State Bank, who with the exception of the Teutopolis State Bank, are the appellants. After hearing on the bill, answers thereto and proof the court entered a decree in favor of appellees. That decree, after finding the entry of the above judgment, the execution and return of the execution, the present existence of the judgment unsatisfied and other formal matters, is as follows:-

"The court further finds from the evidence that at the time the said judgment was rendered against the said Clemens Vahling on the 5th day of December, A.D. 1914, that

the defendants Frank Vahling and Joseph Vahling were indebted to the said Clemens Vahling in the sum of one thousand dollars (\$1,000.00) and that the said Frank Vahling and Clemens (Joseph) Vahling had given to their father, the said Clemens Vahling, their promissory notes for the said sum of one thousand dollars (\$1,000.00), which were then at that time, owned by the said Clemens Vahling; that at the time of the taking of the said judgment, the said Clemens Vahling also owned land in Norton county, Kansas, unincumbered, that was worth from twenty five hundred dollars (\$25,000) to thirty two hundred dollars (\$32,000).

The court further finds from the evidence that the said Clemens Vahling and his wife, Mary Vahling, have since the rendition of the said judgment made a deed for the said land in Norton county, Kansas, to their son, Joseph Vahling, for the purported consideration of twenty five hundred dollars (\$25,000) and that within twenty four (24) hours thereafter the same land was conveyed by the said Joseph Vahling to Mary Vahling, the wife of the said Clemens Vahling, for the same purported consideration, but the court further finds from the evidence that no money or other things of value was paid by the said Joseph Vahling or Mary Vahling for the said land, and that there was no money paid by the said Mary Vahling to the said Joseph Vahling for the said land.

The court further finds from the evidence that the said Mary Vahling afterwards conveyed the same land to Clemens Vahling, Jr., one of the defendants herein, for a consideration of thirty two hundred dollars (\$32,000) and a part of the said consideration of thirty two hundred dollars (\$32,000) as aforesaid was paid in cash, and in that the said Mary Vahling took the notes of the said Clemens Vahling, Jr., for the balance, and that a payment of the said balance of the said consideration has not yet been made, and the same remains unpaid at this time; the court further finds from the evidence that the defendants Joseph Vahling and Frank Vahling, after the said judgment had been obtained on the 6th day of December, A.D. 1914, against their father, Clemens Vahling in lieu of and in place of the said notes so held by their father, Clemens Vahling, that they, the said Joseph Vahling and Frank Vahling, had executed and delivered to the said Clemens Vahling and owed to him, gave new notes aggregating the amount of one thousand dollars (\$1,000) to their mother, Mary Vahling, and the said notes then held by their father, the said Clemens Vahling, were then destroyed; that no consideration was given to the said Clemens Vahling by the said Mary Vahling for the said notes, and that the defendants, Joseph Vahling and Frank Vahling, did not owe their father anything, but the said Clemens Vahling had the said notes destroyed and new notes given by the said Joseph Vahling and Frank Vahling to his wife, the said Mary Vahling, to attempt to defeat the collection of the said judgment.

The court further finds from the evidence that the transfers of the said Norton county, Kansas land as above herein set forth, were all made in an attempt to defeat the payment of the said judgment against the said Clemens Vahling.

The court further finds from the evidence that the said Clemens Vahling was in no way indebted to his wife, Mary Vahling, and that there was no excuse, justification or reason

for making the said transfer of the said Morton county, Kansas land, or the said notes, as above herein set forth, except for the fraudulent purpose of attempting to defeat the payment of the said judgment above referred to.

The court further finds from the evidence that the defendants, Joseph H. Vahling and Frank Vahling, are indebted to the defendant Clemens Vahling, in the sum of one thousand dollars (\$1,000.00) and that the defendants Joseph Vahling and Frank Vahling are not indebted to their mother, the said Mary Vahling, and that the Morton county, Kansas land, is now the property of Clemens Vahling, Jr., and that whatever has been paid by him for the said land to the said Mary Vahling, in fact belongs to the said Clemens Vahling, and that the said Clemens Vahling, Jr., is indebted to his father, Clemens Vahling, for a part of the consideration of the land.

The court further finds from the evidence that all of this property referred to including money, notes and personal property hereinabove described, in fact, belongs to the said Clemens Vahling, and that by virtue of the fraud of the defendants herein, the said Frank Vahling and Joseph Vahling and Mary Vahling are holding the said property as trustees for the said Clemens Vahling, and that the same is subject to the payment of the said judgment above referred to.

It is therefore ordered, adjudged and decreed by the court, that the defendant Mary Vahling, surrender to the said Joseph Vahling and Frank Vahling the notes aggregating the said sum of one thousand dollars (\$1,000.00) that she holds; and that the said defendants, Frank Vahling and Joseph Vahling, execute and deliver to their father, Clemens Vahling, new notes for the said one thousand dollars (\$1,000.00); that the defendant Mary Vahling surrender to the said Clemens Vahling, Jr., the said Morton county, Kansas land, and that all of the said property be subject to the payment of the execution that has heretofore been issued or will be issued upon the judgment of date the fifth (5th) day of December, A.D. 1914.

It is further ordered, adjudged and decreed by the court, that the defendants, Joseph Vahling and Frank Vahling and Mary Vahling, and the defendant Clemens Vahling, pay to the clerk of this court, within thirty days from the entering of this decree the sum of five hundred eighty nine dollars and seventy five cents (\$589.75) with interest thereon at the rate of five per cent (5%) per annum from the 11th day of December, A.D. 1913 and also pay the court costs of twenty eight dollars and fifty cents (\$28.50) made in connection with that judgment, and also pay the costs of this suit in this court.

It is further ordered, adjudged and decreed by the court, that the complainants may have an execution issued under this decree against the property of the defendants or each or any of them, to recover the said judgment, interest and costs and the costs of this suit."

The findings of the court are clearly sustained by the proof.

Counsel for appellants contend that the transfer and conveyance to Mary Vahling of the notes and real estate in

Clemens Vahling, the note

question was in satisfaction of an indebtedness, amounting with interest to \$6000, which her husband, Clemens Vahling, owed her. The father of Mary Vahling had conveyed to her 58 acres of land, a part of which she sold in 1881 and a part in 1884, realizing from the sale \$1500. This money was turned over to Clemens Vahling, and used by him in his business. It is also claimed he owed her for some horses and cows she had owned a number of years before. Mary Vahling never took nor requested any note or other evidence of this indebtedness and never made any demand for the payment of interest or any portion of the indebtedness until after December 11, 1914, the date of the judgment against Clemens Vahling. Soon after the judgment it is claimed she demanded the money and the lender land was conveyed to her and the new notes made payable to her in satisfaction of this indebtedness. While such a transaction would no doubt stand as between the parties, it cannot be sustained as against creditors. It was not made until after the judgment had been secured, and when made it rendered Clemens Vahling, the judgment debtor, insolvent. Both Mary Vahling and Clemens Vahling, stated she demanded the money because she did not want it to get into a law suit. No note was ever given by Clemens Vahling to his wife for this money or any part of it, and no interest was ever paid or demanded. In fact it does not appear that the matter was treated by any of the parties as a valid indebtedness until after the judgment had been rendered. During all these years she permitted Clemens Vahling to so act as to induce others to believe he was the owner of this property, and in such case "Third persons acting reasonably on the strength of such belief and giving credit to him thereupon will be protected." *Haub v. Vaningen*, 196 Ill.2d and authorities therecited. In this respect a judgment creditor stands the same as any other creditor. With v.

Willard, 174 Ill. 538.

Counsel for appellants further contend that because the notes now owned or held by Mary Vahling, were not due at the time the bill herein was filed or the cause heard, there can be no recovery. *Atine v. Cramer*, 92 Ill. 44. The case cited does not support that position. In that case the court held that the judgment debtor had no interest in the funds in question and could not maintain an action for a recovery of the same, and therefore that they could not be reached by a creditor's bill. It is no defense that the notes in question by their terms were not due at the time the bill was filed or the cause heard. And under the authorities herein cited and the facts as clearly established by the proofs the findings of the trial court were correct, in our opinion, the relief granted was in some respects too broad. The ends of justice will be better served by giving and decreeing to complainants a lien upon the unpaid balance of the notes now owned or held by Mary Vahling, than by ordering the surrender of these notes and the making of new ones as is provided by the decree and the facts more clearly warrant such relief. Neither do the facts justify the rendering of any personal judgment against the defendants, Joseph Vahling and Frank Vahling, and the awarding of an execution against them. Accordingly that part of the decree directing the surrender of the notes now in existence, and the making of new ones and giving judgment and awarding execution against Joseph Vahling and Frank Vahling, is reversed but in all other respects the decree is affirmed.

The cause is remanded with directions to the trial court to amend the decree in accordance with the views herein expressed, Appellants will be required to pay one-third of the costs in this court and appellees two-thirds.

Affirmed in part, reversed in part and remanded with directions.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 18th day of December
A. D. 191

.....
Clerk of the Appellate Court

OPINION

Fee, \$

1800

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and nineteen the same being the 28th day of October in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.

Hon. J. C. Eagleton, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

GRANT IRVIN, Sheriff

And afterwards, to-wit; On the seventh day of November, A. D. 1919, there was filed in the office of the Clerk of said Court. at Mt. Vernon, Illinois, an OPINION in the words and figures following:

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J. J. Luellner & Son,
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Appellant
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vs.
No. 51
MARCH TERM, 1919.
.....
.....
Standard-Tilton Milling Co.,
.....
Appellee
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.....

215 I.A. 649

ERROR TO
APPEAL FROM

..... Circuit COURT

..... Harrison COUNTY

TRIAL JUDGE

HON. J. L. GILLHAM

J. J. Mueller & Sons, a
Corporation,
Appellant

v.

Stanard-Tilton Milling Company,
a Corporation,
Appellee

215 I.A. 649

Appeal from Madison.

Opinion by McBee, J. J.

J. J. Mueller & Sons, a corporation, appellant, is engaged in contracting and building. The Stanard-Tilton Milling Company, a corporation, appellee, is engaged in the milling business. In November, 1916, appellant entered into a written contract with appellee to erect an extension to appellee's flour mill at Elton, Illinois, according to certain specifications prepared by a local engineer, for a consideration of \$24,000. The work to be done consisted of extending a part of the elevator building, called the warehouse, from a two-story to a six-story building and erecting a cupola on top. The price covered work and material, subject to additions and deductions. Appellee let the contract for building and the contract for furnishing and installing the milling equipment and machinery separately. The specifications show that a separation of the two lines of work was contemplated from the beginning. Appellant did not have the contract to furnish and install the milling equipment and machinery.

Appellant filed its bill setting forth the contract and specifications, together with certain addenda and a letter to contractors, alleged performance of the contract and some extra work, and that there was due it from appellee a balance

of \$881.68, asking for an accounting, that it be declared to have a lien on the property for the amount due it from appellee, and for foreclosure of lien. Appellee answered the bill admitting the making of the contract, but alleging failure on the part of appellant to carry out the contract, resulting in an expenditure by appellee of \$961.39 to complete the sale, a damage of \$70 to appellee by reason of appellant's negligence and admitting that it owed appellant \$54.95. The case was first referred to the master to hear the evidence and report his conclusions. He found there was due appellant from appellee \$54.95; that appellee had at all times been ready and willing to pay the same, but that appellant would not accept it, and that all other amounts due appellant under the contract had been paid by appellee. The court entered a decree based on the findings and conclusions of the master, and complainant below brought the case to this court on appeal.

After appellant began work a dispute arose between the parties as to whether or not appellant should build the freight elevator called for in the specifications, as appellee contended appellant contracted and agreed to do. Appellant refused to extend and construct the freight elevator and appellee caused the same to be built, expending thereon \$783.88. When appellant began work on the building there was an opening about two and one half by five or six feet between the boiler room and the mill building. Appellant refused to brick up that opening, using timbers to support the superstructure. Appellee had the work of bricking up this opening done at an expense of \$12. Appellee extended for the use of appellant a steam pipe line for which it expended \$72.35. During the course of the work, appellant, in order to support the upper floors of the addition, ran posts up through the roof of the old

building. The openings so made permitted rain to come through and damage appellee's grain and feed to the amount of \$2 . Before extending the elevator and bricking up the opening in the wall, appellee submitted the matter in dispute to the engineer for decision, as the contract provided, and he decided favorably to appellee who after giving notice to appellant to do the work as provided by the contract, proceeded to have the same done by others. The expense of extending the elevator, bricking up the opening in the wall, extending the steam pipe line and the claimed damage to appellee's grain and feed, constitute appellee's counter claim, and the master and court sustained appellee's contention as to each item.

We shall dispose of the disputed matters in the reverse of the order mentioned. We think the evidence sustains the contention of appellee as to the damage of \$20 to grain and feed and that the court properly allowed the same. Appellant's only objection to appellee's claim for expense of installing the steam pipe line for the use of appellant is that appellee might have saved the small sum, \$3.30, had it bought its material elsewhere than where it did. Appellee dealt with responsible people, appears to have used reasonable care in selecting them and expended the amount claimed and there seems to be no good reason why it should not recover the amount so expended. Appellant instead of bricking up the opening in the wall used timbers to support the superstructure. It is not contended that the timbers would not support the building but it was shown that such was not proper workmanship, considering all the facts, and that such an arrangement did not comply with the requirements of the insurance regulations and did not conform to the work in the old building as provided by the specifications.

For those reasons we are of opinion appellee has a right under the contract, to fill the opening with brick and charge the reasonable cost of the same to appellant.

The principal difference between the parties grows out of the expenditure of \$783.88 by appellee in extending the freight elevator. Appellant introduced the testimony of contractors and builders to the effect that a freight elevator is not a part of the building but that it is machinery. Appellee introduced testimony to the effect that appellant at the time of submitting its bid, after having its attention called thereto, placed a construction upon the contract and specifications to the effect that the freight elevator was included in the building contract. The specifications provide "The freight elevator now in the old warehouse is to be extended from the floor it is now, so that the landing on top floor of the elevator will be level with top of fifth floor of warehouse. Contractor is to furnish all material and extend this elevator, also to provide and erect guides and gates on each floor and in keeping with those now used on elevator".

A paragraph of a letter addressed to contractors provides, "The machinery shown on plans and detail drawings are not to be figured on by the contractors bidding on the building. Bids only will be received on the building and awning complete, leave all machinery." The revision of the specifications with reference to the extension of the freight elevator follows the provision as to windows and precedes the provision as to partitions. The provisions applying to the building are grouped together. Following them are the provisions *with reference to the machinery and equipment, being provisions* concerning old and new machinery, tempering tanks and rollers, eleven elevators, belting, lumber, hardware and millwork necessary to connect machinery and machines.

We conclude from the specifications it was clearly intended appellant should extend the freight elevator and the question having been raised before the contract was signed and appellant having placed that interpretation thereon, it became the duty of appellant to extend the freight elevator and not having done so after notice, appellee was justified in extending the same and the amount so extended was a proper charge against appellant. For the reasons given the decree of the circuit court is affirmed.

Affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 18th day of December
A. D. 1917

Clerk of the Appellate Court

OPINION

FEE, \$

Opinion of the Appellate Court

Present:

Hon. Franklin H. Boggs, Presiding Justice.

Hon. J. C. Eagleton, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

GRANT IRVIN, Sheriff

Alexander Sencoumanoff.

Appellee

215 I.A. 650

**ERROR TO
APPEAL FROM**

VS.

Circuit COURT

No. 11.

MARCH TERM, 1919.

Madison COUNTY

D. K. Staikoff et al.,

Appellants

TRIAL JUDGE

HON. J. L. GLEHAM

1875. 1876. 1877.

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relative to the right of the people to elect their representatives to Congress and to the right of the people to elect their representatives to the State Legislatures.

The right of the people to elect their representatives to Congress and to the right of the people to elect their representatives to the State Legislatures is a right which is guaranteed by the Constitution of the United States and by the Constitutions of the several States.

The right of the people to elect their representatives to Congress and to the right of the people to elect their representatives to the State Legislatures is a right which is guaranteed by the Constitution of the United States and by the Constitutions of the several States. The right of the people to elect their representatives to Congress and to the right of the people to elect their representatives to the State Legislatures is a right which is guaranteed by the Constitution of the United States and by the Constitutions of the several States.

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Since the filing of the foregoing opinion, a petition for rehearing was filed by Appellee, and after examining and considering the same, we adhere to the conclusions reached by us as stated in the foregoing opinion.

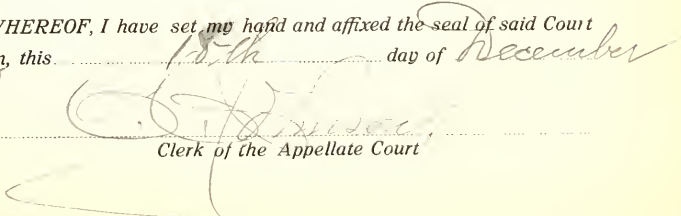
Appellee, however, has called our attention to a mis-statement or two in the opinion which we have corrected, being with reference to the \$1,000 note held by Appellant Staikoff given by Georgeff and Zlateroff, and to which we had referred as being a note for which Staikoff was liable but it should have been a note held by Staikoff. In view of the fact that Appellee contends in his petition for rehearing that we should have stated our reasons for directing that that part of the decree rendered by the trial court enjoining the board of directors from issuing the stock of said company without the authority of the stockholders be vacated, we have concluded to add to said opinion our reasons therefor.

It is our opinion, and we so hold, that the board of directors of a corporation are not required to have the consent or approval of its stockholders to issue and sell the authorized stock of the corporation. The Appellant, Harnden Clay Company, was incorporated with an authorized capital stock of \$25,000, only about \$15,000 of which had been issued prior to the beginning of this suit, and it is now insisted that the board of directors have no power to issue any of the remaining of the authorized stock without the consent of the present stockholders. So far as the record discloses, the board of directors were acting in good faith and we see no reason why they should be restrained from issuing said stock solely on account of the failure to obtain the consent and approval of its stockholders.

With this addition to the opinion, the same is re-filed as the opinion of the court, and the petition for rehearing is denied.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 15th day of December
A. D. 1917


Clerk of the Appellate Court

OPINION

fee, \$

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and nineteen the same being the 28th day of October in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.

Hon. J. C. Eagleton, Justice.

Hon. Harry Hugbee, Justice.

CHARLES C. JOHNSON, Clerk.

GRANT IRVIN, Sheriff

And afterwards, to-wit; On the seventh day of November, A. D. 1919, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

215 I.A. 650

ERROR TO
APPEAL FROM

vs.

Circuit COURT

No. 22

MARCH TERM, 1919.

Wabash COUNTY

Albert Spier,

Defendant in Error

TRIAL JUDGE

HON. J. C. KERN

No. 22.

In the Appellate Court
the State of
of Illinois, Fourth District.

Agenda No. 14

March Term, A. D. 1919.

First State Bank, Et. Carmel,
Plaintiff in error.)

vs.)

Albert Epler,
Defendant in error.)

215 1.A. 650

Assumpsit.

Error to

Wabash County.

Opinion of Boggs, J.

A writ of error was sued out of this Court to reverse a judgment for costs rendered by the circuit court of Wabash County against plaintiff in error, hereafter called plaintiff, in favor of defendant in error, hereafter called defendant. Said cause was tried upon the following stipulation of facts:

"It is stipulated that the following facts are the facts governing the case, namely, that on the Ninth day of October A. D. Nineteen hundred fourteen there had previously been a transaction between one William Alcorn and Albert Epler, the defendant in this case, concerning the execution of deeds and concerning which the said Alcorn claimed there was a failure of title and a breach of covenant in the said deed contained and that the said Alcorn had brought suit against the said Epler and was about to file his declaration therein. That the said Epler was desirous of continuing the matter and securing a delay and that in view of the situation the following contract was, between the parties thereto, duly executed:

"Epler this day pays to Mr. W. S. Alcorn the sum of \$1000 cash and a Note of \$250. due one year after date with 6% interest. He agrees to enter his appearance in a suit to

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be filed after November Term, 1914, and to present his plea to the declaration prior to November Term, which plea is to be filed by plaintiff at time declaration is filed, so that depositions may be taken. Case to be heard at April Term, barring unavoidable delays, it being understood that no technical objections shall be resorted to for delay.

Alcorn agrees not to file his suit until after November Term. If suit results in judgment against Alcorn, he is to pay Spler back the amount received with 6% interest from this date to the date the amount is returned. If judgment is obtained by Alcorn for a less amount than the above, the balance is to be repaid with interest as aforesaid to Spler. If a greater judgment is obtained, the amount set forth shall apply as payment of said judgment.

In case the pleadings cannot be settled out of Court, then said suit may be filed on first day of November Term and appearance immediately entered, and the usual ten days required for service waived, so that pleadings may be settled not later than November Term.

Dated this 9th day of October A. D. 1914.

Albert Spler
Wm. S. Alcorn
By Howard F. French, his Attorney".

That at the time of the execution of this contract the said William Alcorn was indebted to the payee in the Note. That the Note therein mentioned was, by an arrangement between William Alcorn and Albert Spler, made to the payee. That the payee therein, as consideration for the Note, and in accordance with arrangement last aforesaid gave to the said William Alcorn credit for, on the said indebtedness, by the said William Alcorn owing to the payee in a sum equal to the face of said Note. The payee in the said Note at the

time the written contract was made was acting as, and was the Attorney of and for the said William Alcorn; knew of the written contract that the said Apler and Alcorn executed. After, to-wit, ten days from the time of the execution of said Note, payee sold the same for a sum equal to the face of the Note and accrued interest to the plaintiff in this case. Further agreed that the payee in said Note was at the time, President of the plaintiff bank. The sum of money provided for in the contract was along with the note duly paid and receipted for.

That the declaration therein mentioned was subsequently filed and to it a demurrer was at the April Term A. D. 1916, filed, and after argument, sustained, and it was ordered that the plaintiff take nothing by his suit and that the defendant go without day. And it was further ordered that the defendant recover from the plaintiff his costs and charges, by his defense expended and that the defendant have execution therefor, to which ruling of the Court, the plaintiff by his Attorney, prayed an appeal to the Appellate Court for the Fourth District of Illinois, which said appeal was granted upon plaintiff's filing bond in the sum of One hundred dollars, etc. That an appeal bond was filed and the case properly and legally appealed to the Appellate Court for the Fourth District of Illinois and at the April Term A. D. 1917, of said Appellate Court a decision and holding of the lower Court was sustained, which became and was a final judgment in the said case. That the Note sued on marked "Plaintiff's Exhibit "A" is genuine and admissible and admitted in evidence.

That on the fifteenth day of December A. D. 1916, the judgment was taken by the plaintiff in this case against the defendant for the proper amount in the office of the Clerk

of the Circuit Court of Wabash County.

Howard P. French,
Attorney for plaintiff.

Allen L. Walker and A. B. Green,
Attorneys for defendant."

The above stipulation with the note sued on constituted all of the evidence offered by either party to the record. The payee in said note being said Howard P. French.

The record further discloses that on the 18th day of December 1915 being one of the Judicial days of the November Term of said Court, plaintiff procured a judgment by confession on said note in open Court for \$303.50; thereafter on the 21st day of November 1916, an execution having been issued on said judgment an order was granted by one of the Judges of said Judicial Circuit in vacation on motion of the defendant staying said execution and all proceedings thereon until the further order of the Court. Thereafter at the April Term 1917, plaintiff moved the Court to set aside said order on the ground that a Judge in vacation is without jurisdiction to set aside a judgment of the Court so entered. The defendant filed pleas to the said declaration and the cause was continued from term to term until the April Term, 1918, when a jury being waived said cause was submitted to the Court on the above mentioned stipulation of fact. The Court found the issues for the defendant and rendered judgment against plaintiff for costs as above set forth.

One of the contentions of plaintiff is that the Judge of said Court had no jurisdiction in vacation to set aside the judgment rendered by the Court at a former Term. We have examined the record and we fail to find any order purporting to set aside said judgment. The only order made by the Court so far as the record discloses is a stay of

execution. Without reference thereto the record discloses that pleas were filed by the defendant to the declaration and by agreement of the parties said cause was submitted to the Court for a hearing on the merits without a jury on the stipulation of facts above set forth. Plaintiff is therefore not in a position to question the jurisdiction of the Court to determine the issues involved in said controversy on its merits, as the Court had jurisdiction of the subject matter and the parties submitted themselves to its jurisdiction, as above set forth.

Two principal grounds are urged for a reversal of the judgment in this case. That is to say, it is first contended by plaintiff in error that it was a bona fide purchaser of the note in question without notice of any defenses claimed thereto, and for that reason was entitled to recover, and second, that the facts stipulated in the record do not support the averments of the defendant in error's plea of failure of consideration. It will only be necessary for us to discuss the case in connection with the issues raised on the plea of failure of consideration. The record discloses that under the contract entered into between Alcorn and defendant in error, defendant in error was to pay Alcorn \$1000. and was to give him a note of \$250. which said note by agreement between defendant in error and Alcorn was made payable to Howard W. French for the reason that Alcorn owed French and the note was made payable to him directly in order that it apply on such indebtedness. The contract further provided that certain matters were being litigated between Alcorn and defendant in error and that if they terminated in a certain way Alcorn was to pay back to defendant in error the whole or so much of the payment of \$1000. and

said note as was necessary in view of the result of the suit. Said suit was tried and was decided against Alcorn. It is therefore contended by defendant in error that by reason of the fact that said suit was decided against Alcorn the consideration for the note in question failed. We do not agree with this contention for under the law the note was given for a valuable consideration, namely: the promise of Alcorn to re-pay to Apple the whole or such part of the \$1000. and the amount of said note as might be necessary to comply with the judgment that might be rendered in the matters they were then litigating. The result of said litigation in no wise affected the consideration of this note. The note was indorsed by French to the plaintiff in error, who claims to be an innocent purchaser, but in our view of the case the note is not only good in the hands of plaintiff in error, but also would have been good in the hands of French if he should have retained the same. This holding is supported by the following authorities. Newton v. A. J. Clarke, 138 Ill. App. 196; J. Walker Smith et al vs. Western Trust & Guaranty Co., 150 Ill. App. 587; Gage v. Lewis, 68 Ill. 614-616. Defendant in error's right of action, if any, is against Alcorn.

In Gage v. Lewis, ~~supra~~, the court at page 616 says

"Treating the representations alleged in the plea as amounting to a contract between the plaintiff and the defendant, we fail to perceive a want or failure of consideration. The allegation is, that, relying upon these representations and promises, and for no other consideration, the defendant did, etc., 'These representations and promises, then, were the consideration, and the misfortune with the defendant is, not that he did not have them, or that anything has since transpired whereby he is not permitted to resort

to them, but merely that he has not received the benefit from them which he was authorized to expect. In other words, he signed the bond upon the faith of a contract with the plaintiff, which the plaintiff has since failed to keep. The case would, in principle, have been no more different had plaintiff agreed to have paid him a sum of money by a given day, in consideration of his signing the bond, and when the day arrived failed to make payment. It could scarcely be claimed in such a case, while the defendant would have had his remedy upon his contract, that there was no consideration, or that it had failed."

We therefore hold that the court erred in finding the issues for the defendant in error and that the court should have found the issues in this case for the plaintiff in error. The judgment is reversed and the cause remanded.

Reversed and remanded.

Not to be reported in full.

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very small, and that the disease is very rare.

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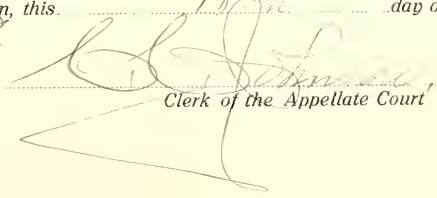
28. The twenty-eighth of these is the fact that the disease is very rare.

29. The twenty-ninth of these is the fact that the disease is very rare.

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I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 18th day of December
A. D. 1919.


Clerk of the Appellate Court

OPINION

FEE, \$

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday
in the month of October in the year of our Lord, one thousand nine hundred and nineteen the same
being the 28th day of October in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.

Hon. J. C. Eagleton, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

GRANT IRVIN, Sheriff

And afterwards, to-wit; On the seventh day of November, A. D. 1919, there was filed in the
office of the Clerk of said Court. at Mt. Vernon, Illinois, an OPINION in the words and figures following:

The Vincennes Bridge Co.,

Appellant

vs.

No. 27

MARCH TERM, 1919.

El Dorado Drainage District

of Saline County, Illinois.

Appellee

215 I.A. 650

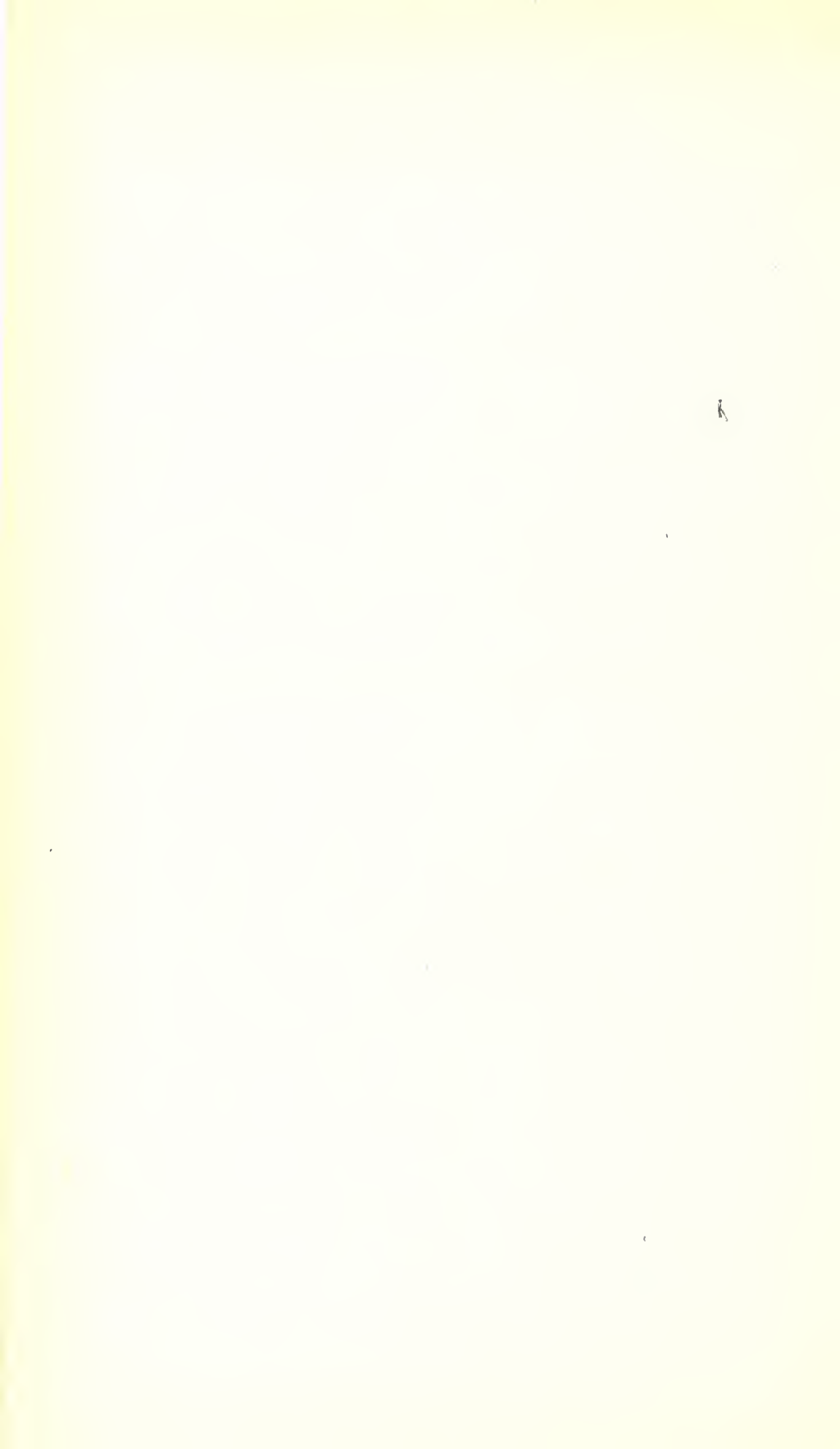
ERROR TO
APPEAL FROM

Circuit COURT

Saline COUNTY

TRIAL JUDGE

HON. A. P. LEWIS



furnishing of soil, gravel and the necessary water and materials for the construction into which all the soils will be at the place mentioned, and it will be the duty of the Government to provide the same to the plantation, etc. The Government must also consent for permission to distribute the land is supported by the people. Article V. Chapter IV, Art. 180, Sec. 1, 1960.

and to be reported in 1991.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 18th day of Dec 201
A. D. 191

Clerk of the Appellate Court

OPINION

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and nineteen the same being the 28th day of October in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.
Hon. J. C. Eagleton, Justice.
Hon. Harry Higbee, Justice.
CHARLES C. JOHNSON, Clerk.

GRANT IRVIN, Sheriff

And afterwards, to-wit; On the seventh day of November, A. D. 1919, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

T. E. Kneedler,
Appellee
vs.
No. 38
MARCH TERM. 1919.
Adam Schickendanz,
Appellant

215 I.A. 650

ERROR TO
APPEAL FROM

Circuit COURT

St. Clair COUNTY

TRIAL JUDGE

HON. GEORGE A. CROW



received 12.7 per cent. interest, a balance of interest of 12.1-
12.4 per cent. due on the ordinary interest of 12.1 per
cent. in the third year to a total of 12.75.

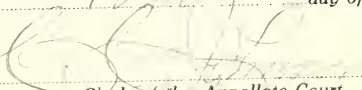
Neither party has been successful in showing that the defendant
did not care to receive the money. The defendant's evidence
from the witnesses is entirely consistent with the fact that he
lives only to himself and every day of his life is spent in
increasing the amount of his money and in providing for the future.
The fact that he does not deliver every day is not an entirely
apparent one to the jury. The defendant did not deliver any if he
had a balance, and he was in a position to make that fact known
and did not. The defendant's evidence is entirely
credible. In this case the jury could be said to have been misled to
dispute the verdict of the jury on this controverted question
as the finding is not against the weight of the evidence.

Granting it to be the fact that certain parties of
counsel for plaintiff desired to be heard on a point of law
to the jury, it is the court's duty to allow them to be heard
as provided in the bill of exceptions, and should be reviewed
by this court. See *V. v. v.*, 100 Cal. 100; *V. v. v.*, 100
Cal. 100; *V. v. v.*, 100 Cal. 100; *V. v. v.*, 100 Cal. 100.

Defendant is not entitled to a new trial, but only an
agreed judgment. He will in any event be liable under the
liability under the circumstances. His liability, at least,
was a substantial defense and should have been raised to the
jury in the proper manner. The jury is not to be
first time in this case, and should have been so. The
defence, however, is not, 100 Cal. 100; *V. v. v.*, 100
Cal. 100.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 18 day of December A. D. 191


Clerk of the Appellate Court

OPINION

FEE, \$

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and nineteen the same being the 28th day of October in the year of our Lord, one thousand nine hundred and nineteen.

Present:

- Hon. Franklin H. Boggs, Presiding Justice.
- Hon. J. C. Eagleton, Justice.
- Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

GRANT IRVIN, Sheriff

And afterwards, to-wit; On the seventh day of November, A. D. 1919, there was filed in the office of the Clerk of said Court. at Mt. Vernon, Illinois, an OPINION in the words and figures following:

.....

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The People of the State of

Illinois, Defendants in Error.

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.....

.....

vs.

No. 21.

OCTOBER TERM, 1918.

MARCH TERM, 1919.

.....

Silvo Pucci,

Plaintiff in Error

.....

.....

215 I.A. 650

ERROR TO
APPEAL FROM

County COURT

Franklin COUNTY

TRIAL JUDGE

HON. NEALY J. GLENN

1955 . 5

October 11, 1918.

of Illinois.

et al. 1999) in

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error is the subject matter
of the proposed study.

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Letter 3.

which would facilitate a less accurate picture from the plaintiff in order about ten times, it has been seen centre prior to the recovery of the indictment, that it stated

like beer and would coincide. 1948 until 1949 later that
he bought liquor seven or eight times, that same year
-iskey he would call for brandy and the other in
-rior would call for whiskey. It would not be in evidence
that the place of the other is a different place. It would
be a form of a different, same, however, it is

The fourth instruction of the request of the people tells the jury that the present law is a contract is not intended to shield the public enemies of the country, so far as human agencies are, the conviction of the innocent man.

In the third instruction in these instructions is frequently given in criminal cases, the jury is told that there is no such thing as a perfect crime, and that the law is not intended to shield the public enemies of the country, so far as human agencies are, the conviction of the innocent man.

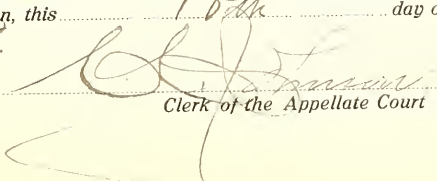
The jury is also instructed by the court and finding of the jury is that the defendant is not in the possession of evidence and the jury is instructed that the defendant is not in the possession of evidence and the jury is instructed that the defendant is not in the possession of evidence.

112.

Not to be reported in 1911.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 18th day of December
A. D. 1917


Clerk of the Appellate Court

OPINION

FEE, \$

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and nineteen the same being the 28th day of October in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.

Hon. J. C. Eagleton, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

GRANT IRVIN, Sheriff

And afterwards, to-wit; On the seventh day of November, A. D. 1919, there was filed in the office of the Clerk of said Court. at Mt. Vernon, Illinois, an OPINION in the words and figures following:

2151.A. 651

Caroline Reainer, Admrx.,

Plaintiff in Error

ERROR TO
APPEAL FROM

vs.

Circuit COURT

No. 28.

MARCH TERM, 1919.

Madison COUNTY

C. & A. R. R. Co.,

Defendant in Error

TRIAL JUDGE

HON. J. F. GILLHAM

Item No. 28.

In the District Court

1900 116

at Chicago, State of Illinois.

Filed 1900 116 116.

Caroline Keener, Plaintiff,
vs. the State of
John Keener, deceased,

215 I.A. 651

Plaintiff in error.

vs.

the State of Illinois,
Defendant in error.

Chicago, Illinois, 1900.

Defendant in error.

Chicago, Ill.

On October 5, 1900, John Keener was killed by a train of the Chicago and North Western Railway Company, in its winter passenger service, Chicago, and continued running until October 19, 1900, when he was killed by a car running on one of the switches therein.

There were several tracks between the 1 to 14 inclusive. Tracks 13 and 14 were main tracks and the others were used for receiving and dispatching of freight. Over these tracks were railroad tracks owned by the Chicago and North Western Railway Company.

Prior to beginning work for the defendant on error Keener had laid various kinds of rails, and on the 19th day of October he was killed by a car running on one of the switches therein.

On the 19th day of October, 1900, the defendant, by his superior, to remove said car from said track number 4 and while so engaged four cars, which had been started by an engine of defendant in error, were running and they collided with the car which Keener was working. These cars were detached from the engine and had no brakes or means to stop or control their full force from a distance of several

1888-1889

The position of the defendant borrower is that a bill of exceptions must be made prior to the entry of the ruling accepted by the judge or justice and that the party may then file and push forward the record without any further grant, prior to the expiration of the time for filing the same. This is a practice generally recognized in this State as well as being an established one in the Federal Courts which are, *111 Ill. App. 1, 100 Ill. App. 2d 71, 100 Ill. App. 2d 71*, and *Smith v. Smith, 70 Ill. 134*.

There is, however, no fixed time for the filing of the bill of exceptions. It is within the discretion of the court and the parties to make such arrangements as they see fit. The bill of exceptions will be required to be filed at the subsequent term or within such further time as the court may direct.

In the case of *Smith v. Smith, 70 Ill. 134*, the court said, in the case of the *Smith v. Smith, 70 Ill. 134*, as follows:

"We understand the practice, and we think the action for a new trial was deferred on the ground because filed, petitioner was successful, if he desired, bill of exceptions signed, to present it to the court (and the signature of the judge, to obtain an order of the court allowing the time for a future day.

In the case of the *Smith v. Smith, 70 Ill. 134*.

"We think, that it is within the discretion of the court, in which the case is tried, if the court is of the opinion that judgment is proper in the case. It may be ordered in any case a party is required to file a bill of exceptions before the motion for a new trial may be presented, and it will not be taken into consideration unless the bill of exceptions is filed with the court on the motion."

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 18th day of December
A. D. 1919


Clerk of the Appellate Court

OPINION

FEE. \$

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and nineteen the same being the 28th day of October in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.

Hon. J. C. Eagleton, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

GRANT IRVIN, Sheriff

And afterwards, to-wit; On the seventh day of November, A. D. 1919, there was filed in the office of the Clerk of said Court. at Mt. Vernon, Illinois, an OPINION in the words and figures following:

.....

.....

Sarah C. Sims,

Appellee

.....

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.....

.....

vs.

No. 37.

MARCH TERM. 1919.

.....

.....

Centralbusiness Men's Assn.,

Appellant

.....

.....

215 I.A. 651

ERROR TO
APPEAL FROM

Circuit COURT

Madison COUNTY

TRIAL JUDGE

HON. J. L. WILLIAM

48

March 22, 1913.

215 I.A. 651

$\frac{1}{2} \times \frac{1}{2} = \frac{1}{4}$

..a, leten J.

Shortly after five o'clock in the evening of August

16, 1917, he was in charge of Mrs. Helen Bremer, an attendant and nurse in the Union Hospital and while performing his duties procuring some clean bed clothes for her room he saw that she had on the roof of the San Antonio Hotel which is still some fourteen or fifteen feet to the ground, striking her head on the ground. She was carried into the hospital in a proper condition and was attending at the hospital, but she died. After she died she breathed heavily and her pulse was weak. He died about eleven o'clock the same evening. The fact of the fall and the condition of Mrs. Bremer after death and the fact of his death were not denied by Mrs. Bremer, who witnessed the fall and was with Mr. Bremer until he died.

In the declaration it was averred that the death of Mr. Bremer was effected directly and independently of all other causes through an accidental cause.

To the declaration submitted with the general issue of the medical issue.

The second medical issue set forth that Mrs. Bremer died as the result of bodily injuries effected as a result of suicide. It further averred that said issue was proven it will not be considered further.

In the other medical issue was set forth that in the application made by Mr. Bremer for the medical issue, he answered the interrogatory as to whether or not he could say that condition in the affirmative and that he warranted said answer to be true and in truth and in fact he was not in sound physical condition, but on the contrary was suffering from a disease or ailment which seriously impaired his physical health and vigor, which disease or ailment was known as syphilitic infection. To this also a replication was filed denying the material averments thereof. Issues were joined and

the cause tried by a jury. The jury returned a verdict in favor of the plaintiff for the sum of \$5,000.00, after a motion for a new trial was overruled, judgment was rendered on the verdict against the defendant and leave to set aside the verdict is granted.

At the close of the plaintiff's evidence and again at the close of all the evidence, the court asked counsel for the defendant to instruct the jury, and from the master's name one of the defendant's attorneys asked the court to instruct the jury that the defendant was not liable for the death of the plaintiff, the court, in so doing, said that the instruction was refused.

It is urged by the defendant that the verdict of the jury is manifestly against the weight of the evidence on the general issue for the reason that it was not shown, by the weight of the evidence, that the death of the plaintiff was effected directly and independently of the other causes through accidental means.

In this connection counsel cite a number of authorities and decide upon the same to an amount that one rule is that where a verdict is manifested against the weight of the evidence it is the duty of the trial court, on a motion for a new trial, to set aside the verdict and issue a new trial and that on the failure of the trial court to do so, that duty, it devolves on a court of review. This rule is so well recognized it is unnecessary to discuss it.

The evidence, in the testimony of the plaintiff's wife, called Mrs. Warner, who testified as above stated, and called Dr. J. H. Siegelbaum.

Dr. Siegelbaum testified he was a licensed physician and surgeon in Madison County, Illinois, for nearly forty-three years. He was then propounded a hypothetical question in which was set forth the fact of a man's (instead of fourteen

feet and variable deformities existing, as they existed with-
r. After the first is detailed by Dr. Allen, and the
subsequent death of the patient is followed by an opinion
as to the cause of death, which is supported by evidence
in the negative. It was then that the opinion
was the cause of death and he answered the first question.
These questions were answered in a satisfactory and
full manner.

On the second night of the testimony of Dr. Allen
the following was stated:

There on the second night of the testimony Dr. Allen
stated:

Dr. Allen testified that the patient of the
Lyon Hospital and had been engaged in the practice of
medicine in Illinois since 1875, that he first saw Dr. Williams
in 1880 after he left, that he found extensive swellings of
the face, that there was considerable swelling, that there
was found from the nostrils and elsewhere that he found no
evidence of fracture of the skull. He gave as his opinion
that paresis was a contributing cause in the death of Dr.
Williams. Dr. Allen also testified that the lungs contained
by Dr. Williams might easily produce death in a healthy individual
and that they could have caused the death of Dr. Williams had he
been a healthy man.

Dr. Allen also testified that a spirochete is commonly
known as "fevering" in the brain, and that the primary cause
is luetic infection or syphilis. The spirochete being known as
spirocheta. The spirochete is a small rod-shaped organism that
goes through the tissues and finally infects the brain. That
the spirochete may be in the system many years without af-
fecting the brain and that only in a very small percentage of
the cases is the brain ever affected. That paresis begins



In the case of the Y. S. Commercial Bank, 273 1st St., in New York, the bank was destroyed by fire on the night of the 1st of January, 1900. The fire was caused by a gas stove in the kitchen. The fire spread rapidly and the building was completely destroyed. The loss was estimated at \$100,000. The fire was caused by a gas stove in the kitchen. The fire spread rapidly and the building was completely destroyed. The loss was estimated at \$100,000. The fire was caused by a gas stove in the kitchen. The fire spread rapidly and the building was completely destroyed. The loss was estimated at \$100,000.

It cannot be said that the fire was caused by a gas stove in the kitchen. The fire spread rapidly and the building was completely destroyed. The loss was estimated at \$100,000. The fire was caused by a gas stove in the kitchen. The fire spread rapidly and the building was completely destroyed. The loss was estimated at \$100,000. The fire was caused by a gas stove in the kitchen. The fire spread rapidly and the building was completely destroyed. The loss was estimated at \$100,000. The fire was caused by a gas stove in the kitchen. The fire spread rapidly and the building was completely destroyed. The loss was estimated at \$100,000.

The jury was instructed, if the facts of the case were proved, that if, at the time of the fire, the building was occupied by a large number of people, and that the fire was caused by a gas stove in the kitchen, and that the fire spread rapidly and the building was completely destroyed, the loss was estimated at \$100,000. The fire was caused by a gas stove in the kitchen. The fire spread rapidly and the building was completely destroyed. The loss was estimated at \$100,000. The fire was caused by a gas stove in the kitchen. The fire spread rapidly and the building was completely destroyed. The loss was estimated at \$100,000.

in the argument I presented myself, my father
attorneys used this language:

"They ask you jury to not to forget, for that that
r. has was a symbolized - that's what it is, it is not even
those children."

It is proved that it is proved that the jury
against the defendant and all in the defendant's error
The record discloses that the jury, in the defendant's error
for excellent, admitted that the jury, in the defendant's error
the defendant and the jury, in the defendant's error
were held that the jury, in the defendant's error
under the defendant's error, the jury, in the defendant's error
to the jury, in the defendant's error.

According to the defendant's error, the
judgment of the trial court will be affirmed.

REVEREND.

Let it be recorded in the

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 18th day of December
A. D. 1919

Clerk of the Appellate Court

7550

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and nineteen the same being the 28th day of October in the year of our Lord, one thousand nine hundred and nineteen.

Present:

- Hon. Franklin H. Boggs, Presiding Justice.
- Hon. J. C. Eagleton, Justice.
- Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

GRANT IRVIN, Sheriff

And afterwards, to-wit; On the seventh day of November, A. D. 1919, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

.....

.....

John H. Joyce, Admr.,

Appellee

.....

.....

.....

vs.

No. 42

MARCH TERM, 1919.

.....

.....

East St. Louis Ry. Co.,

Appellant

.....

.....

215 I.A. 651

ERROR TO
APPEAL FROM

City COURT

East St. Louis COUNTY

TRIAL JUDGE

HON. SILAS COOK



Item 15. 42.

In the Special Court
of Illinois, North District.
March Term 1910.

March 1, 1910.

John H. Joyce, Administrator
of the Estate of Charles J. Joyce,
deceased, Plaintiff,

215 I.A. 651

vs.

Central Trust and City
Trust Company of St. Louis

Defendant.
Amended.

Equity No. 1.

On November 20, 1909, the defendant, Central
Trust and City Trust Company, was appointed receiver of the
St. Louis Railway Company, and was authorized to operate the street
railway on the street crossing the roadway in the city of St. Louis
to St. Louis.

This street crosses Calumet Creek and a number of
railroads located near said creek. Over the creek and rail-
road tracks is a viaduct used for all kinds of travel. The
viaduct has a flat top or deck about one hundred fifty feet
long, which is directly over the creek and railroad tracks
and is about twenty-five feet above the tracks. At either
end of the deck is an overpass. The western overpass is
straight for a distance of about one hundred feet above
the deck and then curves to the left for a
distance of one hundred forty-eight feet for tracks and then
extends west to the end of the viaduct. The eastern overpass
is three hundred ninety feet long. On the outer sides of the
viaduct are sidewalks for foot travel and immediately inside
the sidewalks are street car tracks used by passenger. The
North track being used for east bound cars and the other for
west bound cars.

A short distance east of the viaduct from First Street crossing Broadway and going on to Second Street, at 600 Broadway, John Cole had a station car at the east end of the viaduct, 25 ft. long, 60 ft. wide. The National Cash Register Company had a fixed 22 inch wide on Main Street in front of the building - 10 ft. from the roadway it was necessary to drive by viaduct.

On that date, there started from 2nd Avenue to the place of business of the National Cash Register Company on Main Street. He went in a large automobile. On the second floor of the building was a room where J. J. Joyce, a boy aged nine years, John McLaughlin and his daughter, his wife, and a man whose name is unknown. While was driving the automobile and with the man whose name is unknown in the front seat at the controls, and the other persons in the rear seat. There was also a cash register in the rear part of the automobile.

While driving to the viaduct on the north side of Broadway. When he reached Main Street he was in front of the east bound car. There were other vehicles at that place and in passing, Cole turned to the north until he was on the north side of the east bound street car track. At this time a west bound car of the viaduct was coming across the viaduct, and when the automobile was a short distance east of John Street the car and automobile collided and the driver was severely injured and was taken to a hospital where he died December 10, 1918, as the result of his injuries received.

This suit was brought by the administrator, who is the appellee.

The declaration contained three counts. The first and second counts charged the appellants with carelessness and negligence in the management of the cars whereby the deceased

was injured and the third count charged the defendant with violating an ordinance of the City of New York, which limited the speed of cars on street highways to ten miles per hour and thereby held the defendant convicted with the first count was summarily affirmed. Verdict for the defendant was entered.

In the declaration the defendant pleaded a plea of not guilty.

The case was tried by a jury, who returned a verdict for \$10,000.00 in favor of the plaintiff. After a motion for a new trial was made, the court was requested to set aside the verdict and grant a new trial. The court refused.

At the close of the evidence for the plaintiff the defendant made separate motions at each point in the declaration that the court instruct the jury to return a verdict of not guilty under each point in the declaration which were removed at the close of all the evidence. These motions were denied.

In the argument of counsel for the defendant of the attorneys made the following statement:

"I say to you, in my opinion, and I say to you that it is up to you to find a verdict for the plaintiff. I expressly opinioned and said that it is worth it if isn't worth anything, I regard it. It doesn't do less than \$10,000.00, in my opinion. Now, if there is a, would be a fair and just compensation for the loss of the family sustained."

The defendant objected to these remarks and the objection was overruled.

In support of the third count in the declaration the plaintiff offered in evidence an ordinance of the City

Various witnesses were called and gave descriptions of the ~~background~~^{ings} immediately after the collision.

It is not mentioned by any of the witnesses that the ordinance limiting the speed of horse-drawn carriages or other vehicles was regularly passed and published, but it is possible that ordinance has been repealed by an ordinance, known as ordinance number 1841, passed November 4, 1849, by the City Council of the City of West St. Louis and is approved by the Mayor of said city on the 10th day of November, 1849.

Ordinance number 1841 limits the speed of horses of street cars to twelve miles per hour and provides a penalty of not less than ten nor more than two hundred dollars for violating said ordinance.

This ordinance was offered in evidence with the following certificate attached:

"I, J. S. Nelson, City Clerk, of the City of West St. Louis, Illinois, do hereby certify that the above and foregoing is a true and correct copy of Ordinance No. 1849.

And I further certify that the said ordinance number 1849 in which the foregoing is a certified copy, is by law, intrusted to my custody and is in the law, and is on my file in office."

Council for said city objected to the certified copy and the objection was sustained.

It will be observed the only law published of Ordinance No. 1849 was a copy certified as above.

The facts are as follows:

All ordinances, titles and ordinances, containing any fines, penalty, imprisonment or forfeiture,-----, shall, within one month after they are passed, be published at least once in a newspaper published in the city or village,-----; and no such ordinance shall take effect until ten days after

it is so utilized.

James v. Thompson, 117. 189. 190. 191. 192.

The total of the proceeds:

And, moreover, the fact that the corporation is a
may be proved by the certificate of the clerk, under the
seal of the corporation.

James v. Thompson, 117. 189. 190. 191. 192.

The certificate of the clerk of the court is
or is not, and even so, it is not the duty of the court
to find in a criminal case.

The duty of the court is to leave the question
of guilt to the jury. The court is to determine whether
the verdict is supported by the evidence. The court stated
there was a jury in the case. It is being true
a court is required to find the fact if the jury
unless it is manifestly against the weight of the evidence.
Such conviction does not appear.

It is urged the court erred in instructing
the jury to find the defendant guilty under the third
count. That was done with reference to the evidence
pertaining to that count.

Finally it is urged that the statement of counsel
for appellee is a terrible error. In discussing the question
of this kind in the case of *James v. Thompson*, 117. 189. 190. 191. 192.
The court said: "The duty of the court is to leave the question
of guilt to the jury. The court is to determine whether
the verdict is supported by the evidence. The court stated
there was a jury in the case. It is being true
a court is required to find the fact if the jury
unless it is manifestly against the weight of the evidence.
Such conviction does not appear."

The court said: "The duty of the court is to leave the question
of guilt to the jury. The court is to determine whether
the verdict is supported by the evidence. The court stated
there was a jury in the case. It is being true
a court is required to find the fact if the jury
unless it is manifestly against the weight of the evidence.
Such conviction does not appear."

and which under no theory of the case can be justified.

While the remark contained in the above paragraph and which is
not incorrect, we cannot say that it is in itself in fact
we should call upon interference by the law."

The whole situation is set in this case, and the work
which is not done here is not done, and the reversal
of the case.

Nothing is to be said by the court, and it is
till court is called.

Justice.

And to be treated in fact.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 18th day of December
A. D. 1917

Clerk of the Appellate Court

OPINION

FEE, \$

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and nineteen the same being the 28th day of October in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.

Hon. J. C. Eaqleton, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

GRANT IRVIN, Sheriff

And afterwards, to-wit; On the seventh day of November, A. D. 1919, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

215 I.A. 651

**ERROR TO
APPEAL FROM**

VS.

Circuit..... COURT

No. 53

MARCH TERM, 1919.

1. d. son..... COUNTY

H. J. Dayer

Appellant

TRIAL JUDGE

HON.....J. E. GILLHAM.....

General No. 53. In the Appellate Court, Agenda No. 42
State of Illinois.
Fourth District.
March Term, A. D. 1919.

J. J. Allen,)
Appellee)
vs.)
R. J. Moyer,)
Appellant.)

215 I.A. 651

Appeal from the Circuit Court of
Madison County, Illinois.

Magleton J.

The appellant, R. J. Moyer, and the appellee, J. J. Allen were residents of the City of Venice, Illinois, and for many years had been acquaintances. In the fall of 1917 the appellant purchased a second hand Ford automobile for \$265.00. In a conversation shortly thereafter with the appellee, the appellant told what he paid for the automobile and the appellee expressed a desire to get a similar car if he could get it at a price as reasonable and told the appellant to keep on the lookout for such a car. A little later the appellant informed the appellee that he had found such a car that could be purchased for \$275.00. After some negotiation the appellee purchased the car and gave the appellant a check for \$148.00 and a note for \$125.00 each payable to the appellant and promised to pay appellant \$25.00 on appellee's next pay day.

The appellee claims he purchased the automobile from the appellant and gives that as a reason why the check and note were payable to the appellant. On the other hand the appellant claims a certain man named Miller was the vendor and that he acted only as the friend of appellee and that in closing up the deal the appellee did not have enough money to pay for the car and appellant loaned him \$125.00 for which the note was given also the \$25.00 and that the check was paid to him because

168 3-10-18

the appellee requested him to close up the deal.

The appellee kept the car until April 1918, when two detectives from the Police Department of St. Louis, Mo., presented proofs to the appellee, which he accepted as sufficient, that the car had been stolen and appellee turned it over to the detectives.

The appellant testified that Miller brought the car from St. Louis, Mo., and left it in front of appellant's house, that he notified the appellee that he would bring Miller to the place where the appellee was working, and appellee and Miller could fix the matter up and Miller give the appellee a bill of sale. He also testified that the appellee told him to go ahead and close the deal and look after the bill of sale because he, the appellee, did not have the time to attend to it, and that pursuant to the directions of the appellee he did close the deal and procured Miller to make a bill of sale which the appellant delivered to the appellee.

On the trial of the case the appellant offered the bill of sale in evidence to which offer the appellee objected and the objection was sustained. This ruling of the court is assigned as error. The testimony of the appellant that he procured the bill of sale to be made at the request of the appellee and delivered it to the appellee made the bill of sale competent as evidence and it was error for the court to refuse it. It was properly a matter to be considered by the jury to be given such weight as they deemed it entitled to.

Complaint is made by appellant against the first, second, sixth and seventh instructions given by the court to the jury at the request of the appellee. The first instruction is as follows:

"The court instructs the jury that if you believe from the evidence that Henry Bayer, at the time of asking the

sale of the automobile to J. J. Allen, he unduly concealed some important facts concerning the title therein, which he knew or could have learned by reasonable diligence on his part, such as exercised by an ordinarily prudent man, then you should find for the plaintiff."

This instruction assumes the appellant made the sale. That was one of the issues to be determined by the jury. The court erred in giving this instruction. An instruction should not be given that assumes as a fact one of the issues to be tried. The second, sixth and seventh instructions given at the request of the appellee are open to the same criticism.

It is next urged that the court erred in refusing to give to the jury the two refused instructions offered by the appellant. Each of these instructions informs the jury, in substance, that if the appellant acted as the agent of the appellee in the purchase of the car the appellee cannot recover. These instructions did not state the law correctly. It is not the law that because one is an agent he is not liable for a loss occasioned by his negligence. On the contrary he may be liable. The rule stated in *Lochem on Agency* (2nd ed.) Sec. 1396 is as follows:

"He (the agent) owes a duty of reasonable care in securing goods or other property of the kind, amount, quality, and condition which he is authorized to purchase; in agreeing upon price, terms and conditions; in examining into the matter of the seller's title and freedom from incumbrances where this is involved in the purchase; -----."

As has been stated it is claimed by the appellee that the title to the car failed and for that reason he suffered loss. If the appellant acted as agent of the appellee in the purchase of the car the appellant cannot free himself on the ground, alone, that he was the agent of the appellee. The

giving of either of these instructions would, in effect, have told the jury the appellant would not be liable under any circumstances if he was acting as the agent of the appellee.

The rule stated is general and in all cases where the relation of principal and agent exists what is reasonable care is determined by the facts and circumstances under which the agency arises and the nature of the business to be transacted by the agent.

Finally it is urged that the court erred in permitting the detectives to testify they were informed the automobile was stolen. It appears in the transcript of the record they did so testify but it does not appear therein that the appellant made any objection thereto and for that reason the question will not be considered.

For the reasons indicated the judgment of the trial court will be reversed and the cause remanded for a new trial.

REVEREND & HONORABLE

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this day of December
A. D. 191.....

.....
Clerk of the Appellate Court

OPINION

FEE, \$

.....

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7770

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and nineteen the same being the 28th day of October in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.

Hon. J. C. Eagleton, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

GRANT IRVIN, Sheriff

And afterwards, to-wit; On the seventh day of November, A. D. 1919, there was filed in the office of the Clerk of said Court. at Mt. Vernon, Illinois, an OPINION in the words and figures following:

215 I.A. 651

Stormont and Alexander et al.

Appellants

ERROR TO
APPEAL FROM

vs.

Circuit COURT

No. 5
OCTOBER
x MARCH TERM, 1919.

Jefferson COUNTY

Actna Insurance Company,

Appellee

TRIAL JUDGE

HON. CHARLES I. MILLER

Term No. 5.

In the Appellate Court.

Agenda No. 6.

Fourth District.

October Term A. D. 1919.

215 I.A. 651

Louisa Stormont and Nora A. Alexander, partners,)
doing business as Stormont & Alexander, for the)
use of the said Stormont & Alexander, and for)
the use of Albert Watson, Cera C. Whitlock,)
Joseph E. Craus, Burrell Mledge, Stanley Watson,)
Edward Wells, Isaac Hicks, Nora Hicks, A. E.)
Hicks, Samuel J. Hicks, Thomas L. Luby,)
Mainwright Davis, Carl Howard, Samuel L. Farlow,)
Jonathan Wells, Elsie Hale, Ed Grosus, Eugene)
E. Bare and Lottie Knowles, doing business as)
The Bank of Connie, Illinois.)

Appeal from
the Circuit
Court of
Jefferson
County.

Appellants.

vs.

Aetna Insurance Company,

Appellee.

Per Curiam.

The original opinion in this case was written by the late Justice McBride, and, with some slight modifications, was adopted and filed as the opinion of the Court. A rehearing having been granted, the cause was re-argued at the present term of Court, and upon further consideration of said cause, we have reached the same conclusion and adhere to our former holding and re-file said opinion as the opinion of the Court on the rehearing.

REVEREND MR. JUSTICE.

1900 11 6 18

McBride, J.

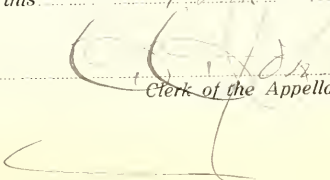
This case was heard by the Circuit Court in connection with the case of Stornet and Alexander, partners, etc., et al vs. Hartford Fire Insurance Company, and the two causes were heard together and determined upon the same testimony, and the facts and circumstances are the same in each of the cases and the decision of one in fact disposes of the other. We are of the opinion that this case is controlled by the decision in the case of Stornet and Alexander, partners, etc., et al vs. Hartford Fire Insurance Company and for the reasons set forth in that opinion the judgment of the lower court is reversed and the cause remanded.

REVERSED AND REMANDED.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 18th day of December
A. D. 1919


Clerk of the Appellate Court

OPINION

HEE. S

=====

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7916

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and nineteen the same being the 28th day of October in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.

Hon. J. C. Eagleton, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

GRANT IRVIN, Sheriff

And afterwards, to-wit; On the seventh day of November, A. D. 1919, there was filed in the office of the Clerk of said Court. at Mt. Vernon, Illinois, an OPINION in the words and figures following:

215 I.A. 652

ERROR TO
APPEAL FROM

vs.

COURT

No. 43
OCTOBER TERM, 1918.
MARCH TERM 1919.

COUNTY

TRIAL JUDGE

HON. JULIUS C. KERN







I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this day of *December*
A. D. 191.....

[Signature]
Clerk of the Appellate Court

OPINION

FEE, \$

.....

61-11 772-11
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April,
in the year of our Lord one thousand nine hundred and nine-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

CURT S. AYERS, Sheriff.

215 I.A. 652

BE IT REMEMBERED, that afterwards, to-wit: on

JUL 15 1919

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Op. slightly modified
R-H Dur. Oct 8/19



Gen. No. 6656.

The People of the State of
Illinois. Deft. in error.

215 I.A. 652

vs

Error to Rock Island.

Frederick Schmidt.

Pltf in error.

Niehaus, P. J.

The plaintiff in error Frederick Schmidt was indicted in the circuit court of Rock Island County for selling intoxicating liquors in the town of Rock Island which is anti-saloon territory; also for maintaining a liquor nuisance at the place designated as "a certain room on the first floor of a certain two story building located and known as 1606 Second Avenue, within said town of Rock Island." The indictment contained twenty seven counts each charging sale of intoxicating liquors, and one count charging the maintenance of a nuisance. There was a trial by jury which resulted in finding the plaintiff in error guilty on four counts of the indictment; also finding him guilty of the charge in the nuisance count. A motion for a new trial was made and denied, and a judgment thereupon entered against the plaintiff in error, sentencing him to pay a fine of \$100 on each of the counts in the indictment of which he was found guilty, and to confinement in jail under the nuisance count, for a period of twenty days; also ordering that the premises described as the place of the nuisance be shut up, and abated in accordance with the statute. From this judgment a writ of error is now prosecuted.

The proof shows that plaintiff in error several years prior to the time that the town of Rock Island became anti-saloon territory, conducted a saloon on the first floor of the premises in question known as 1606 Second Avenue; and that after the town

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became anti saloon territory the place had been ostensibly converted into what was called a "soft drink parlor", where near beer and other soft drinks were kept for sale and sold. No change made in the general appearance or equipment of the place; the saloon fixtures which had been put in for saloon purposes remaining the same. The evidence shows that two sales of whiskey were made in this place about September 9th.; there was at least one sale of whiskey on the 15th. of September; and several sales of whiskey on the 16th. of September; all in the year 1918. A record of a former conviction for selling intoxicating liquor in this anti saloon territory ~~at the place described~~, was admitted in evidence under the nuisance count.

For reversal of the judgment of conviction several grounds are urged; it is contended that the description of the place of the alleged nuisance is insufficient, and uncertain. In view of the fact, that the first fl or of the premises designated had but one room, which took in the entire floor, no uncertainty could arise in the location of this room on the first floor; and the description of the place of the alleged nuisance is sufficient under the holding of this court in People v Roman, 193 Ill. App. 393. It is insisted that there was a fatal variance in the description of the place of the nuisance as alleged in the indictment and as shown by the proof because the place is described in the indictment as a two story building, and the proof shows that the building is three stories in height. The number of stories in the building above the first were not an essential part of the proof. The nuisance was alleged to be on the first floor of the place described; and it did not make any material difference whether the building had one ~~xxxxxx~~ ~~xx~~ story or two stories above the first floor. The designation of the number of stories was merely a part of the matter of identification of the place; but in this case the place was

sufficiently and clearly identified as No. 1606 Second Avenue; the variance was therefore immaterial and of no legal consequence. It is also claimed that there is no proof that the offences in question were committed in the town of Rock Island. 'It is not necessary to establish the venue in a criminal case by positive testimony; nor is it necessary that some one should testify in so many words, to the place where the offence was committed, but it is sufficient if the evidence as a whole leaves no reasonable doubt that the act upon which the indictment is based has been committed at the place laid in the indictment.' Porter v People 158 Ill. 370; Weinberg v People 208 Ill. 15. The evidence on this point was sufficient to show beyond a reasonable doubt that 1606 Second Avenue was in the city of Rock Island; and there was also evidence from which the jury were justified in finding that the sales were within the township of Rock Island; but the courts take judicial cognizance without proof of the political divisions of the state into counties towns and cities; and of the relative location of such towns with respect to each other. Gunning v People 189 Ill. 165. As a matter of law therefore, it was not necessary to prove in this case that the city of Rock Island was in the town of Rock Island.

Plaintiff in error also complains of the giving of the 4th. instruction for the People, in which the jury were told that it was not necessary for the people to prove the intoxicating quality of the liquor sold, but that it was sufficient to prove that the plaintiff in error sold distilled or spirituous liquor. The court did not err in giving this instruction. The sales proven were of whiskey. Courts take judicial notice that whiskey is a spirituous liquor, 16 Cyc. 856. If the proof shows, that a defendant illegally sold spirituous liquor, that is sufficient to sustain a conviction under the provisions of the statute, without proving its intoxicating quality, because this liquor is specified

in the statute. Nor was it incumbent on the people to show, that the persons in charge on the place, who were the servants of the plaintiff in error, were authorized by the plaintiff in error to sell the liquor in question; nor that he had knowledge of the sales made; People v Elliott 272 Ill. 593; People v Barney, 300 Ill. App. 531; But there is proof contained in the record from which the jury were justified in concluding that the sales made, were made in the course of the business which the plaintiff in error conducted at the place described. We are of opinion, that the proof made was sufficient to show the guilt of the plaintiff in error under the counts of the indictment on which the conviction is based; and that there is no reversible error in the record. The judgment is therefore affirmed.

Judgment affirmed

STATE OF ILLINOIS.
SECOND DISTRICT.

} ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April,
in the year of our Lord one thousand nine hundred and nine-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

CURT S. AYERS, Sheriff.

215 I.A. 652

BE IT REMEMBERED, that afterwards, to-wit: on

JUL 18 1919

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

R-H Dec. Oct 8/9

Gen. No. 6657

J. H. Forquer, appellee

215 I.A. 652

vs Appeal from Knox.

C. B. Thomas, et al appellants.

Niehaus, P. J.

The proofs in this case show that the appellants C. B. Thomas and J. Dexter Pierce, who were co-partners under the firm name of Thomas & Pierce, and dealers in North Dakota lands, on the third of October, 1916, entered into a written contract with the appellee J. H. Forquer, by which it was agreed that appellants should pay to the appellee as commissions, the sum of \$3.00 per acre for all lands which appellants would sell to customers obtained by the appellee; or to parties who should ~~pay~~ first apply to said Thomas & Pierce for lands through the efforts or influence of the appellee. It is also provided in the contract that the commission is payable in cash at the time of the consummation of the sale, provided one third of the purchase price of such land be paid in cash. The appellee claims, that on the basis of this contract he procured a purchaser for the North Dakota lands in the person of Ira E. Fritz, who purchased from the appellants 320 acres of these lands at \$45.00 per acre, making a total of \$14,400.00. The appellant took in payment of \$5,000.00 of the sale price of said land a stock of second hand goods; and 18 acres of land on west main street in Galesburg. After this sale to Fritz, the appellee claimed his commission in the sum of \$960.00 but the appellants refused to pay until they could realize cash on the property taken by them in part payment; and the appellee thereupon commenced suit in the circuit court of Knox county to recover the commissions claimed. There was a trial by jury which resulted in a verdict in favor of the appellee for \$640.00. The appellants made a motion for a new trial, which was denied, and a

judgment was entered against the appellant C. P. Thomas, who took an appeal to this court; the judgment was reversed on the ground that the verdict was against both appellants and the judgment was against one only. Forquer v Thomas 211 Ill. App. 603. The case was thereupon redocketed in the circuit court, and the error cured by entering the judgment against both appellants, in conformity with the verdict, from which this appeal is now prosecuted.

The only matter now presented for consideration by the brief of appellants counsel is, that the verdict of the jury is manifestly against the weight of the evidence. The testimony of the appellee as to the services rendered under his contract is to the effect that he is engaged in the real estate business at ~~xxxx~~ Maquon, Illinois, and made the contract with the appellants; that thereafter he looked up Ira Fritz who afterwards purchased the land in question; that he first called Fritz' attention to the North Dakota Land which appellants were selling, and the desirability of purchasing it; and that Fritz told him he would trade his entire stock of goods for North Dakota land if it suited him; that he told Fritz he would talk with Mr. Thomas about the matter, and did so; and Thomas said he would make a trade with Fritz if he would invoice his goods; and that this was the beginning of negotiations between the parties which afterwards resulted in the sale in question. While it is true, that the testimony of the appellee is contradicted in some of the details testified to by him, the main and vital fact that he procured, or was the means of procuring the customer for appellants, who finally purchased the land is not disproved. The general rule is that the agent is entitled to commissions if a purchaser is procured by him with whom a valid binding and enforceable contract is made ~~xxxx~~ even though executory in form. Wilson v Mason, 158 Ill. 304. And the appellants practically conceded the right of the appellee to a commission for

the sale made, in several letters written by them; but refused to pay on the ground merely that they had not received any cash from the transaction, and would not pay the appellee until they could get cash for the property which they took in part payment. Under these circumstances it cannot be said that the verdict is against the weight of the evidence.

Appellants also made the point, that the appellee is not legally entitled to his commissions, because the purchaser had not paid one third of the purchase price in cash. "A sale in the ordinary sense of the word is a transfer of property for a fixed price in money or its equivalent." Five Per Cent Cases 110 U. S. 471. The appellants took \$5000.00 of the purchase price of the land in question in property, and as the equivalent of that much money, and this was more than one third of the purchase price, having treated this payment as the equivalent of cash in making the sale it should also be treated in the same way in the matter of their obligation to pay the commissions which accrued to appellee on account of such sale. We are of opinion therefore that appellee was entitled to recover his commissions ~~notwithstanding~~ notwithstanding the fact, that the payment of the one third part of the purchase price was taken in property, the equivalent of money, instead of money. The judgment is affirmed.

Juigment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT.

{ SS.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.



*Continued
denied*

1-4-2

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April,
in the year of our Lord one thousand nine hundred and nine-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

CURT S. AYERS, Sheriff.

215 I.A. 652

BE IT REMEMBERED, that afterwards, to-wit: on

JUL 10 1899 the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Op modified

R-H Den Oct 5/19

Mamie Thompson, Appellee,

-vs-

Chicago, Ottawa, & Northern
Railway Company, a corporation,
Appellant.

215 I.A. 652

Appeal from Illinois.

Carnes, J.

This is an appeal from a judgment on a verdict of \$5000. in favor of appellee, Mamie Thompson, for an injury received by her at appellant's grade crossing of a public highway September 2, 1903. We reversed a judgment on a verdict of \$5000. obtained at a former trial (190 Ill.App.240) holding that the evidence did not support any one of the three charges of negligence of the defendant, and remanded the cause. The situation is described and the controverted facts fully discussed in that opinion, and this is to be read in connection with what is there said. The charges of appellant's negligence were and are, (1) that appellant failed to give the required signals of approach to the crossing; (2), that it approached the crossing at a high and dangerous rate of speed; and (3), that appellant's servants in charge of its car did not keep a reasonable lookout in approaching the crossing, the last two charges to be considered coupled with the fact that there was a large gathering of people likely to use the crossing at that time, which was then known to appellant. On both trials there was a sharp conflict of testimony on each of the three charges of negligence. Appellee's testimony on the first trial read alone showed actionable negligence. Then, as now, the conclusion must be reached by

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weighing the credibility of witnesses for the respective parties. In our first opinion we discussed at length the testimony of the three points, and concluded that, after giving due consideration to the superior opportunity of the jury and the trial judge to determine the credibility of witnesses, it was still our duty to reverse the judgment on the ground that the verdict was not supported by the evidence.

On the second trial before another judge and jury the same controversies of fact arose, and that tribunal again found appellee's witnesses more worthy of belief. On this appeal appellant's counsel did not in their original brief invoke the doctrine of res adjudicata, and did not claim that the evidence was the same, or substantially the same, as on the former trial; but said that it was more favorable to the defendant now than it was before. Appellee's counsel undertook to demonstrate that it was more favorable for her than in the former trial. We considered the case without having in mind the doctrine of res adjudicata as announced in *City of Chicago v. Lord*, 229 Ill. 167; *Mille v. Grand Lodge B. of R. T.*, 282 Ill. 438; and *People v. Fraimge Comrs.* 282 Ill. 514, and authorities there cited, and concluded that we ought to say, as did the court in *Egbers v. Egbers*, 177 Ill. 82, that while it may appear from the record before us that the defendant's made out the stronger case upon the facts, it must be considered that the jury and the court below saw and heard the witnesses and had better means of weighing their testimony than we have; and while we might have been better satisfied from the evidence in the record with a different verdict, we should not interfere with it, especially where two trials have produced the same result.

We filed an opinion affirming the judgment, which on the question of the defendant's negligence was based on that view of our duty. A petition for re-hearing was filed by appellant urging that the evidence was substantially the same on the second trial as the first, and therefore that we were bound under the authorities above noted to adhere to our first decision that the necessary finding of appellant's negligence involved in the verdict had no sufficient support in the evidence. We granted a re-hearing, and have again carefully examined the record to determine whether the evidence was substantially the same bringing the case within the rule announced in those authorities, or whether a different case was made on the second trial by the introduction of further and material testimony, thus presenting a new case requiring a consideration now of the entire case upon the second trial, and the application of such principles of law to its decision as are applicable in the new case as announced in Penn. Plate Glass Co., v. J. H. Rice Co., 210 Ill. 567, 573; and Belskis v. Dering Coal Co., 246 Ill. 62. ~~We find that it appeared on this trial and not before that appellant was incorporated under the General Railroad Act, and was therefore governed by the provisions of that act and not by the provisions of the Horse and Dummy Act.~~ This difference in the two records calls for application of different rules in determining the duty of the defendant in approaching the crossing. Roy v. St. Louis & Suburban Ry. Co., 119 Ill. App. 313; St. L. A. & T. H. R. R. Co. v. Odum, 53 Ill. App. 519; and Elgin, Joliet & Eastern Ry. Co. v. Lawlor, 132 Ill. App. 280. The witnesses testifying on the second trial were not the same as the first. Walter Snell, the driver of the carriage, testified on the first trial and not on the second. His wife, who was sitting with

him in the carriage, testified on the second trial and not on the first. On the first trial there were nine witnesses who testified that no whistle was blown as the crossing was approached. On the second there were eleven who so testified for the plaintiff, and one of defendant's witnesses testified that he heard no whistle. Other of defendant's witnesses conflicted in their testimony whether the whistle was blown more than once in approaching the crossing. The evidence also was different from that before on the question of where the car stopped after the accident, which fact had a bearing on the question of speed.

Appellant in its argument devotes several pages to discussion of the testimony of Donald Frazier and Catherine Frazier, and Mrs. Snell, who were material and important witnesses testifying for the first time on the second trial in support of appellee's charges of defendant's negligence. Some witnesses for each side testifying on both trials mentioned on the second incidental facts that were omitted in their testimony on the first. We think it is clear that the evidence in the two records is neither the same, nor substantially the same; that it differs sufficiently to present here a new case to be considered and determined on the facts and law presented on this record. We conclude on our second examination of this record that the jury were warranted in crediting appellee's witnesses on the question of the rate of speed at which appellant was approaching the crossing. On the other two questions the evidence is not precisely the same as before. It can hardly be said to be substantially the same. Some witnesses testified

for each party as to facts controlling more than one of the three questions. If a court or jury discredits such a witness on one issue it is likely to discredit him when he testifies on another; and holding as we do that the jury were warranted in discrediting appellant's witnesses on one issue we cannot say there was reversible error in discrediting those same witnesses on another issue on which there was conflicting evidence. We therefore conclude, as we did on our first examination of the present record, that we are not warranted from a ruling of the testimony in saying that the jury erred in their conclusion that actionable negligence charged in the declaration was proven by a preponderance of the evidence. Appellant does not question any ruling of the court on the evidence or instructions to the jury, but, in addition to its claims before noted, contends that the evidence does not show appellee in the exercise of due care, or of any care, for her own safety at the time of the injury; and that appellee's counsel made prejudicial remarks in their pleas to the jury. It is conceded that the judgment is not excessive if appellee is entitled to one in any amount; At the time of the injury appellee had been visiting her sister, Mrs. Snell, and on the evening in question went with her, her husband, and four little children, to an amusement park near the scene of the accident. They were leaving the park in a surrey, Mr. and Mrs. Snell and their little boy sitting on the front seat; appellee and two little children on the back seat. The back and side curtains were drawn. The conveyance was one on common use in the Snell family, the horses gentle, and Mr. Snell competent to drive. Appellee had ridden with him frequently. As they drove from the amusement park a short distance to the crossing, appellant's road for a long distance could at times

be seen by occupants of the carriage if they were looking in that direction. Had appellee known the place of the crossing and felt impelled to keep a lookout in that direction she probably would have seen the headlight of the approaching car in time to warn her brother-in-law and thus avoid the accident. Instead of doing this she gave her entire attention to the little children on the seat with her and trusted entirely to her brother-in-law's care and management of the team. He was familiar with the situation, and she had never visited the place but once before, and had not clearly in mind where the crossing was. Appellant's counsel insist that due care required some action or exertion on her part, and point out that she might with sufficient carefulness and watchfulness have avoided the injury, and argue with great confidence that a woman so situated on the back seat of a curtained surrey with two little children is so negligent in not being alert and looking for danger that the case should be reversed on that ground without remanding. We see little force in this contention. It is true that most accidents at grade crossings could be avoided with sufficient care and prudence by travelers on the highway. Many happen, and railway companies often respond in damages occasioned thereby. It is not a question whether some action on the part of appellee would have avoided the injury, or whether some very careful woman under the circumstances might have been inclined to supervise the conduct of the team, but rather whether the ordinarily prudent woman under the same or similar conditions would have trusted entirely to the driver and confined her attention to the little children on the seat with her. This was a question for the jury, and we are satisfied with their finding, which means that in their

opinion appellate at the time the case in question was giving her mind and attention to subjects that would ordinarily occupy a reasonably prudent woman under such conditions. If we were considering the conduct of Mr. Snell, the driver, we could not say, as matter of law, that he was negligent in failing to look and listen. The trial court could not so instruct the jury. This is too well and too long settled in this state to require citation of authority. Whether failure to look and listen is or not negligence is a question left to the consideration of the jury. There are circumstances where it might seem that a failure to look and listen was so manifest negligence that a court might be permitted to assume it as matter of law on the ground that all fair minded men would come to the same conclusion; but we recall no Illinois case where a trial court had been permitted to assume that authority.

It is well settled in this state that the negligence of the driver cannot be imputed to the passenger in actions of this character. The authorities are collected on that question in an opinion by this court in *Hess v. Hoyt*, 164 Ill.App.338, and appellant here concedes that such is the law; but its counsel well say that this does not relieve the plaintiff from proving due care on her part, and refer to *Flynn v. Chicago City Ry. Co.*, 250 Ill.460, as illustrating that point. In that case three men, partially intoxicated, were, in the night time, trying out a blind horse's speed on a rough road, driving in violation of a city ordinance. It is apparent that under such circumstances a fair question might arise whether the two men not driving the horse were in the exercise of ordinary care in permitting themselves to ride in the buggy in that way. Many considerations may arise

in any situation involving the question of the care of the passenger. In the present case if appellee had been familiar with the grounds, and the location of the crossing, and the driver had been a comparative stranger there; or, if he had not been a skilful driver, or had been intoxicated, it might well be argued that an ordinarily prudent woman would have been looking and listening with a view to warning him of danger; but no condition of that kind existed.

We see nothing in the remarks of counsel addressing the jury that should, in our opinion, be held reversible error. The situation was somewhat dramatic because of the direct contradiction in the testimony before mentioned. Counsel for appellee possibly exceeded the strict limit of legitimate argument in one or two instances, but there is nothing in what they said to cause a reversal of the judgment in a record where no other ^{error} of law is claimed, and the verdict concededly not excessive. The judgment is affirmed.

Affirmed.

STATE OF ILLINOIS, } SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in
SECOND DISTRICT. }
and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

775

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October,
in the year of our Lord one thousand nine hundred and nine-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

CURT S. AYERS, Sheriff.

215 I.A. 653

BE IT REMEMBERED, that afterwards, to-wit: on October
14, 1919, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:



Gen. No. 6660.

Agenda 7.

April Term 1919.

American Hominy Company,
a corporation,

215 I.A. 653

-vs-

Appellant,

Appeal from Will.

Manhattan Farmers Grain
Company, a corporation,

Appellee.

Carnes, J.

Appellant, American Hominy Company, in January, 1917, had two contracts with appellee, Manhattan Farmers Grain Company, for delivery in the future of No. 3 white corn to appellant at Decatur, Illinois, at a price stipulated, grade and weight guaranteed by appellee, the seller, at destination. Several shipments of corn were made by appellee and accepted by appellant under those contracts, and finally on March 20, 1917, and April 6, 1917, appellee in attempted compliance with said contracts shipped to appellant two carloads of corn that are called in this record car No. 16309, and Car No. 7608. Appellant refused to accept said corn because it claimed it did not grade No. 3 white corn; whereupon, at the instance of appellee, each car was trans-shipped to Chicago. Appellant brought this action in assumpsit, declaring specially on each of said contracts, and averring failure of appellee to perform by delivery of No. 3 white corn. Appellee plead the general issue, and filed an affidavit of merits, which is not abstracted. The damages claimed by appellant aggregate \$1834.54, that being the difference between the contract price and the market price of No. 3 white corn at the times in question. There was a trial in

3151A.653

Jan. 20, 1933.

American Laundry Company,
a corporation,
Chicago, Ill.

-v-

Washington Farmers Union
Company, a corporation.

Chicago, Ill.

Chicago, Ill.

On the 1st day of January, 1933, the
two parties with respect to the
delivery in the State of Illinois of
linens, at a price of \$1.00 per
yard, the value of which is
approximately \$100,000.00. The
same were made by the parties and
contracted, and filed on the 1st day of
January in the State of Illinois with
the State of Illinois at each place
No. 10000, and No. 10000. The parties
because it is the duty of the parties
the image of the parties, and the
parties brought this action to enforce
on each of said contracts, as
perform by delivery of 100,000
yards, and filed an affidavit of service
The parties claimed by agreement of
the difference between the parties
No 2 with each of the parties.

which appellant read to the jury a stipulation of the parties covering the facts as above stated, and reciting "that the sole and only question in dispute between the parties in this cause is whether or not the corn shipped by defendant in L. & N. car No. 16309, and in P. T. & I. car No. 7608, graded no. 3 white corn as specified by said contracts." Appellant, after reading said stipulation, introduced evidence tending to support its contention that said corn was grade No. 4 instead of grade No. 3. Appellee then introduced evidence tending to support its contention. A verdict for the defendant was rendered, upon which the court, after overruling appellant's motion for a new trial, entered judgment, from which this appeal is prosecuted.

Appellant urges that the court erred in instructing the jury as to the burden of proof, and much attention is given to that question in the briefs. The record, as above noted, shows that only one disputed fact was submitted to the jury. Appellant in its statement of the case says that the only question to be determined by the jury was whether or not the corn in said two cars was grade No. 3 at the time it reached Decatur. If it was, appellee had fulfilled its contract. If it was not, appellant was entitled to damages. It is true that had the case been tried on full written pleadings instead of putting the question to the jury by this stipulation, there might have been an issue whether appellee had relieved itself by tendering to appellant the goods contracted for. Perhaps that issue would have arisen on plea by defendant confessing the contract and avoiding liability by averring a tender, which it would have taken the burden of proving as stated in 13 Corpus Juris 764, and authorities there cited. We are inclined to the opinion that on this record, the burden

which is... the...
covering the...
and only...
is...
No. 16-03, and in...
is...
attestation, introduced...
that...
then introduced...
verified for the...
overriding...
from which...

plaintiff...
jury...
that...
that only...
in its...
determined by...
court was...
officer had...
was...
on full...
jury by...
appeal...
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defendant...
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as stated...
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rested on appellee to prove that the corn was in fact grade No.3; but the manner of presenting the case confused that question and left ground for plausible arguments for and against that position, as the briefs here bear witness. Appellant assumed in the court below that the burden was on it and acted on that theory in introducing proof, and offered an instruction, which the court gave, "that if the plaintiff has proved its case by a preponderance of the evidence, your verdict should be for the plaintiff." The court then, at the instance of appellee, instructed the jury if the plaintiff had not so established its case their verdict should be for the defendant. We presume this position was wrong, but it was invited by appellant and it cannot be heard to complain here because the trial court adopted its view of the law. Appellant in its reply brief says, "It is not contended that appellee had the burden of showing in the first instance that it had complied with the contract." The instructions seem in accord with that position.

The contracts provided that the corn should grade No.3 at Decatur. There were at the time federal provisions of law for official inspection of corn in interstate commerce, and state provisions of law for official inspection of corn in intrastate commerce in this state; but there was no provision, either federal or state, under which this grain could be officially inspected in Decatur. It is several times stated in appellant's brief that the parties contracted with reference to the federal inspection law, but the evidence supporting that statement is not pointed out, and

and we do not know what is relied on to sustain that contention. And it does not seem very material to the issue here presented. The case was tried on the undisputed theory that the grade No.3 depended upon the moisture content, which must not exceed 17.5 per cent, and the amount of damaged corn and foreign material, which must not be more than 6 per cent. There is no evidence or contention that the grade failed because of moisture. The sole contention is that each car contained 8 per cent of damaged corn, and for that reason fell in grade No.4 instead of No.3. Therefore, the question submitted by the stipulation became only whether there was more than 6 per cent damaged corn. Appellant called one Garland as a witness as to the grade of corn in car No.16309. He was employed by it to inspect that corn at Decatur. It is claimed he was therefore biased; but he seems to us a fair, competent, credible witness, and he testified in full support of appellant's claim that the inspection showed 8 per cent damaged corn. He also inspected at Decatur the corn in car No.7608, and testified that it contained 8 per cent damaged corn. As before noted, each of those cars was shipped to Chicago where the grain was handled for appellee by one Delany, a grain commission man. He inspected the corn and testified for appellee that each car of corn tested No.3. His testimony is attacked by appellant on the ground that he might be biased for appellee, and it is claimed the evidence does not clearly show that the corn he examined was taken from the cars in question. He also seems to us a fair, competent and credible witness, and we think it is reasonably certain that the corn he examined was taken from the car in question. Car No.7608 was sold by Delany, acting as agent for appellee, to appellant as No.3 corn, and paid for as such for use

in its Indianapolis mill. Both cars of corn were inspected in Chicago by deputy inspectors of the Illinois Grain Inspection Department, and their certificates read in evidence by appellee under a stipulation that they might be so used as part of defendant's testimony, and both there passed as No 3 white corn. It is claimed by appellant that there was no inspection at that time for damaged corn. The blank in the certificate after "Damaged Corn" was not filled, but there was testimony that the omission to fill that blank meant there was not enough damaged corn to raise a question as to grade. Each party introduced other testimony tending to support its contention. It would unduly extend this opinion to discuss it all in detail. It is sufficient to say that a fair case was presented for the determination of the jury, with the evidence on the one fact in controversy so nearly balanced that the finding of the jury ought to control. The evidence read from the record seems to more strongly support the defendant's contention.

Car No.7608, was as before noted, purchased by appellant as No 3 corn and shipped to one of its mills at Indianapolis, where it was officially inspected and said to contain 8 per cent heat, damaged and mahogany. The certificate to that effect was offered in evidence by appellant, and objection to it sustained by the court. This is assigned as error. The inspector was called as a witness for the plaintiff and allowed to testify fully as to his inspection and what he found, using his certificate as a memoranda to testify from; therefore, the jury had full knowledge of that inspection and its result, and we cannot see that the mere exclusion of the paper was of enough consequence to warrant an

in its Indianapolis file, 1905 copy of same was forwarded in Chicago by deputy inspector of the Illinois State Insurrection Commission, and their certification was in evidence by exhibits under a stipulation that they are to be used as such in the testimony of the defendant, and both were given in the 1905 report. It is stated by appellant that these were introduced after the fact for damage done. The board in the certificate after "damaged corn" was not filled, but later was testimony that the omission to fill the block report was not enough damaged corn to raise a question as to grade. I am sorry informed of the testimony tending to support the contention, it would hardly tend this opinion to stand itself in detail. It is well known to say that a fair case was presented for the determination of the jury, with the evidence on the one side in comparative as nearly balanced that the finding on the part of the jury was to condemn. The evidence read from the record tends to more strongly support the defendant's contention.

On 10/10/05, a before noted, presented by plaintiff as the 3 corn and alleged to be of the grade of Indianapolis, when it was officially inspected and said to contain 2 bushels per bushel, and category. The certification to that effect was offered in evidence by appellant, and objection to its admission by the court. This is assigned as error. The court was called as a witness for the plaintiff and allowed to testify fully as to his inspection and what he found, and his certification as a memorandum to testify that; therefore, the jury was well informed of that inspection and its result, and we cannot see that the mere exclusion of the paper was of enough consequence to warrant an

examination and discussion of cases cited by appellant indicating that the document itself was a proper instrument of evidence. If the court there erred, it was not harmful error.

Appellant offered in evidence a printed pamphlet containing the order of the Secretary of Agriculture establishing the official grain standards of the United States. This was excluded, and much attention is given in the briefs to the question whether it was a public document admissible in evidence under the rule found in Wigmore on Evidence, volume 3, page 2156. We are inclined to the opinion that it was competent evidence if pertinent to the issue, but it did not purport to apply to intrastate commerce and could only be pertinent coupled with proof that the parties contracted with reference to that standard of inspection; and, as we have before said, we do not know where the evidence of that fact is found. But, assuming that was true, still there was no harmful error in excluding the pamphlet. Witnesses had testified fully as to the rules governing the inspection of corn and stated specifically what the federal rules were. There was nothing more of interest to the jury to be learned from reading that pamphlet; much less was there anything in it to help them answer the one question presented- whether there was more than 6 per cent damaged corn in either of the two cargoes.

At the times the corn was rejected by appellant on the ground that it was not No.3 but was No. 4 grade, it offered to accept the corn on the contracts at a discount from the contract price. That being in evidence, appellee was permitted to prove

...in relation to the question of money ...
...that the document itself was a proper instrument of evidence.
...it the court were asked, it was not correct to say.

...evidence offered in evidence ...
...the state of the document at ...
...again ... of the United States ...
...attention is given in the ...
...public document ...
...signatures on evidence, volume ...
...opinion that it was ...
...but it did not ...
...only be ...
...with reference to that ...
...before said, we do not ...
...found. But, assuming that ...
...error in excluding the ...
...to the rules ...
...only what the ...
...tort to the jury to be ...
...I as was there ...
...presented - whether there ...
...in either of the two ...

...at the time the ...
...ground that it was not ...
...except the ...
...price. That being in evidence, ...

over the objection of appellant the market price of No 4 corn at those times, which was much more than the price offered. This is urged as error. We do not think it was pertinent to the issue, which, to repeat, was whether there was more than 6 per cent damaged corn in those cargoes. But there was much evidence introduced by appellant as to No.4 corn, the method of ascertaining its grade, etc., which had little, if any, bearing on the issue. The jury knew that the market value of No.3 corn was at the time much above the contract price, and no doubt knew that No 4 corn increased in market value in about the same proportion. We do not think the admission of this testimony was reversible error.

The court refused two instructions offered by appellant to the effect that as matter of law white corn containing as much as 8 per cent or more than 6 per cent damaged corn was not No.3 white corn. It is strongly insisted that this is the law because the official grain standards of the United States so determine, and it is argued that without those instructions the jury had no guide or standard to determine whether the corn tendered was in compliance with the contract. The answer is that, as before stated, the federal law regulating interstate commerce had no application as a law governing this case. If, as before said, it had any application at all it was because the parties may have contracted with reference to it. It follows that the court was asked to instruct the jury as to a fact, which he was not required to do, though he might have done it in this case without much error because the fact stated in the instructions was before the jury again and again in the evidence without contradiction or dispute.

over the question of whether the Government was to be a party to the
the same, which was done by the Government. The
in regard to the same. It is not a question of the Government
which, to repeat, was done by the Government. It is not a question
and in some cases. But there was much evidence presented by
appeared in 1914, the method of conducting its work,
etc., which was little, if any, known to the Government. The
know that the Government was not to be a party to the same. And
about the same time, and we would say that the Government is
extended in some ways in that the Government is not a party to the
which the Government of the Government was not a party to the same.

The same thing was done by the Government. It is not a question
to the effect that the Government was not a party to the same. It is not a question
and a party to the same. It is not a question of the Government
white man. It is not a question of the Government. It is not a question
the official position of the Government. It is not a question of the Government
and it is signed that the Government was not a party to the same. It is not a question
which is signed to the Government. It is not a question of the Government
compliance with the Government. It is not a question of the Government
acted, the Government was not a party to the same. It is not a question
and the Government was not a party to the same. It is not a question
had any application to it. It is not a question of the Government
contested with reference to it. It is not a question of the Government
asked to instruct the Government. It is not a question of the Government
to do, though he might have done so. It is not a question of the Government
because the fact that the Government was not a party to the same. It is not a question
again and again in the Government. It is not a question of the Government.

The court at the instance of appellee instructed the jury if the defendant shipped from Manhattan, Illinois, to the plaintiff at Decatur, Illinois, said two carloads of corn, and that the corn contained in said cars was of a grade No.3, and the plaintiff refused to accept said corn, then the defendant had complied with its contract and they should find the issue for the defendant. This is objected to because the word "contract" was used instead of "contracts", and also because it fixes attention on the grade of the corn at the place of shipment and not at its destination contrary to the terms of the contracts. The first objection seems trivial. The second is answered by noting that the court had already instructed the jury at the instance of appellant if the corn shipped by the defendant from Manhattan to the plaintiff at Decatur was not No.3 white corn, their verdict should be for the plaintiff. There was considerable evidence offered by each party as to the grade of the corn at places other than its destination, and the court at the instance of appellant instructed the jury that under the stipulation of facts the grade at the time of arrival in Decatur controlled, and that evidence as to its grade at other places was only important insofar as it proved, or tended to prove, the grade at Decatur. There is nothing in the record indicating that there was more or less damaged corn in those cargoes at any other time and place than there was when it arrived in Decatur; therefore, the case was naturally tried in the court below by both parties somewhat disregarding the contract specification as to the time and place of determining the grade. We find no material error in the instructions or admission of evidence in that respect.

We conclude that appellant had a fair and impartial trial free from prejudicial error; that technical errors disclosed by the record were unimportant, and of little consequence except the question of the burden of proof, and on that the trial court adopted appellant's view of the law and it therefore became good law for that trial. (Zukas v. Paleton Mfg. Co., 200 Ill. App. 403.) The judgment is affirmed.

Affirmed.

The judgment is affirmed.
The trial. (James v. [illegible] 12. [illegible] 1891.)
ed [illegible] view of the [illegible] [illegible] [illegible]
position of the [illegible] [illegible] [illegible] [illegible]
the [illegible] were [illegible] [illegible] [illegible] [illegible]
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to [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT.

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SS.

I. CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

6535

796

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October,
in the year of our Lord one thousand nine hundred and nine-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

CURT S. AYERS, Sheriff.

215 I.A. 653

BE IT REMEMBERED, that afterwards, to-wit: on October
14, 1919, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

box was strapped with iron bands, which were broken when it reached its destination, and the fact that it had been tampered with was apparent on casual observation. There is no doubt that the value of the goods lost considerably exceeded the amount of the verdict. It is not claimed that plaintiff in error as the initial carrier is not liable in this action if the goods were lost after the box was put in its charge in New York, and before its delivery by the connecting carrier to a drayman in Peoria. That drayman died before his testimony could be taken, and while there is some effort in the evidence to show that the box was delivered to him in good condition, that claim is not seriously made here in the argument. In plaintiff in error's brief its contention is stated, "that if the shortage existed in the shipment, it existed at the time the box was delivered to plaintiff in error at pier 41, New York City." It is not much contended that the judgment should be reversed if the jury were warranted in finding that the shortage occurred after the box was so delivered in New York City. No material error in the instructions to the jury is suggested, and no important question raised as to rulings on the evidence. Authorities are cited in support of the propositions that the burden is on the plaintiff to show delivery of goods to the carrier, and in case of injury to the goods to show that they were in good condition when delivered to the carrier; that the plaintiff is bound to show affirmatively receipt of the goods in good order by the carrier, and in the absence of proof as to the condition of the goods when delivered to the carrier the presumption is that they were in the same condition when delivered to the consignee as when delivered to the carrier. The jury were instructed at the instance of the defendant below in accordance with the above

... was addressed to the ...
... the ...
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... "that if the ...
... times the box ...
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principles and that the must find the defendant not guilty unless the plaintiff had shown by the greater weight of all the evidence that the merchandise in question was actually delivered to the Delaware, Lackawanna & Western Railroad Company at New York for transportation to the plaintiff at Peoria, and was actually lost while in the possession of the defendant, or some connecting carrier, Therefore, the main inquiry here is whether the evidence supports that necessary finding of the jury.

The railroad company receipted for the box as received by it in good order. The proof leaves no question that it reached defendant in error in very bad order. If it had presented that appearance when delivered to the railroad company it is not reasonable to believe that it would have made a record of "received in good order"; and it is not probable that it would have received the box at all in the apparent condition it was in at Peoria. This evidence, standing alone, would have been sufficient to justify a jury in saying beyond all reasonable doubt that the box was opened and the goods abstracted after delivery to the railroad company in New York. But it also appeared that the goods were packed in the box by Goldberg, Levy & Company May 20, 1913, and sent out by an express company for delivery to the railroad company on that or the next day, the evidence leaves it uncertain which. The express company had gone out of business, and the express man could not be located. Plaintiff in error claims it was received by it May 22. The estimated weight of the box and its contents when it was packed by the vendor was about 600 pounds. It was weighed by the railroad company and its records show 370 pounds. This evidence, standing alone, would lead to the conclusion that the shortage occurred before the

box reached the railroad company. The proof of receipt by the railroad company on May 22 is based on the date on the rubber stamp supposed to indicate the time of receipt. It was the practice to put that stamp on the original bill of lading and the shipping order at the same time. There was proof tending to show that the stamp was not on the original bill of lading when it was delivered to Goldberg, Levy & Company, and it is argued that it was not on the shipping order at that time, but was placed there afterwards; that if the clerk omitted to stamp the shipping order until the 22nd he would naturally use that day's stamp bearing that date. In the absence of that date on the stamp the evidence would be quite clear that the goods were delivered to the railroad company the same day that they left the vendor's place of business. The record of the railroad company as to the weight of the box when received is also questioned by defendant in error, and the evidence leaves some doubt as to its accuracy. It is a peculiar case, with credible evidence introduced by each party sustaining its contention. We agree with the plaintiff in error that if it only leaves room for conjecture where the goods were lost, it does not support the verdict. But it is a civil case; proof beyond reasonable doubt is not required, and after a careful reading of the record we conclude the verdict is not so manifestly against the weight of the evidence as to justify a reversal of the judgment on that ground.

Three instructions offered by defendant were refused. That action of the trial court is formally assigned as error, but in plaintiff in error's brief it only suggests that the court ought to have been given without pointing out what they are claimed to contain

box received the letter, however. The letter is dated 12th
received company on 10th or 11th of 1890, and is addressed to
imposed to produce the letter, however. It was a letter
to put the same on the original bill of lading, and to
order of the same date. There was some correspondence
which was not on the original bill of lading, and was
to shipping, and it is possible that it was a letter
shipping order of 10th date, but the original bill of lading
it is not certain to which the shipping order refers, but
was naturally and the bill of lading is dated 12th. In the
absence of the bill of lading, the shipping order is the only
that the goods were delivered to the railway company, the date is
that they left the warehouse at 10th date. The letter of the
railway company is dated 12th, and is addressed to the
question by letter of 10th date, and is dated 12th. The
concerns to the company. It is a letter dated 12th, and is
evidence furnished by each of its stations, the original
exists with the original in error, and it is only because the
conjecture where the goods were lost, it was not found, and
lost. But it is a bill of lading, and the original is dated 12th
not received, and there is a certain amount of evidence in relation
the vessel is not as necessarily dated as the original, and the
is a letter of 10th date, and is dated 12th.

Three instructions dated by letter of 10th date. The
action of the vessel is dated 12th, and is dated 12th.
The bill of lading is dated 12th, and is dated 12th.
been given, and the original is dated 12th.

necessary to a proper trial of its case. We see nothing in them except an unnecessary repetition of the law that the burden of proof was on the plaintiff below, and find no error in their refusal.

It is argued that the court erred in admitting a copy of the bill of lading in evidence. It appeared from a statement of plaintiff in error's counsel in the trial court and from the testimony of witnesses that the practice was for the shipper to fill out a blank bill of lading and give two or three copies to the express man, who hands them to the railroad company with the goods to be shipped. The railroad company signs one copy and hands it to the express man, who returns it, so signed, to the shipper; that in this case two copies were handed to plaintiff in error—one was signed and handed to the express man and by him returned to the shipper, Goldberg, Levy & Company, and placed in their files. There was testimony that afterwards on claim being made for loss of good this paper was taken from the shipper's files and presented to plaintiff in error where a copy of it was signed by one of its agents. The original was taken back to the shipper's files and afterwards destroyed in a fire that occurred there; the copy was preserved, and is the paper admitted in evidence. Notice had been served on plaintiff in error to produce what was termed the original, but it failed to do so, saying the original was the paper delivered to the shipper. In speaking of the original paper customarily signed by the railroad and given to the shipper as above noted, there is confusion of terms in the record. It is on a printed blank, and in the printer matter said to be "an acknowledgment that a bill of lading has been issued and not

...necessary to a proper trial of the case. It was necessary to have
except an unnecessary repetition of the facts and the evidence of the
as on the trial of the case, and the evidence of the case.

It is noted that the court stated in its opinion that the bill of
the bill of lading in evidence. It is stated that the bill of lading
contained in error's original in the bill of lading and the bill of lading
testimony of witnesses that the evidence was not the original but
bill out a blank bill of lading and the bill of lading in the
express was, who handed them to the railroad company with the bill of lading
to be shipped.

The railroad company of goods and goods and goods and goods
it to the express man, who returned it, in return, to the railroad
that it is the same the goods were received in evidence in the
one was signed and handed to the express man by the railroad
to the shipper, originally, and the bill of lading in the
files. There was testimony that the bill of lading in the
for loss of goods and goods and goods and goods and goods and goods
and presented to the bill of lading in the bill of lading in the bill of lading
by the bill of lading. The original bill of lading in the bill of lading
files and the bill of lading in the bill of lading in the bill of lading
the copy was preserved, and it was not lost in the bill of lading
Active had been preserved as a bill of lading in the bill of lading in the bill of lading
I want the original, but I want to see the original, the original
was the original delivered to the shipper. In evidence of the
original paper containing the bill of lading by the railroad and given to
the shipper as above stated, and it is a bill of lading in the bill of lading
It is on a print of a bill of lading and in the bill of lading in the bill of lading
an acknowledgment that a bill of lading was given to the shipper and not

"the original bill of lading, nor a copy, or duplicate", and that it is "intended solely for filing on record"; but whatever the paper is called, there is no question that the original was delivered to the shipper, above noted, and no question that the paper received in evidence was a correct copy; and there was evidence that the copy itself was signed by an agent of the railroad company. Plaintiff in error on the trial introduced its written memoranda and evidence of the transaction, and sometimes confusion resulted there in witnesses speaking from the copy instead of the original. We do not see any error in the ruling on this paper.

Finding no error in the record, the judgment is affirmed.

Affirmed.

Niehau, P.J., took no part.

STATE OF ILLINOIS, }
SECOND DISTRICT. }

SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

Clerk of the Appellate Court.

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Certiorari
denied

777

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October,
in the year of our Lord one thousand nine hundred and nine-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

CURT S. AYERS, Sheriff.

215 I.A. 653

BE IT REMEMBERED, that afterwards, to-wit: on October
14, 1919, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6636

Emma F. Allen, appellee

215 I.A. 653

vs

Appeal from Whiteside.

Estate of Henry P. Allen, deceased.

Carnes, J.

Appellee, Emma F. Allen, filed in the county court of Whiteside County a claim against the estate of her father Henry P. Allen, for care and nursing of his wife, her mother, from March 11, 1908 to February 16, 1916, at the rate of \$10. per week -----\$4,100. There was a jury trial resulting in the allowance of the full amount of the claim. On appeal to the circuit court there was another verdict and judgment thereon for the same amount. Representatives of the estate prosecute this appeal. There is no claim or suggestion that the services were not rendered, and were not of the value claimed. No criticism of the instructions given to the jury. There is some complaint of rulings on evidence, but appellant's main contention is that the family relation existed between the claimant and her father at the time the services were rendered, and that there is not sufficient evidence to rebut the presumption arising from that relation that the services were rendered as a gratuity.

The undisputed facts are that Henry P. Allen lived with his family at Madison, Wisconsin, about fifteen years prior to the fall of 1908, when they moved to Tampico, Illinois, and there resided until his death. Claimant was about forty eight years old at the time of her fathers death, and had been a member of his family all ~~his~~ ~~his~~ her life. She had married when about nineteen years of age, and with her husband continued to live at the home of her parents for about eight years when she secured a divorce from her

8131A-853

Gen. No. 1000

Exhibit A, 1000

Exhibit A, 1000

vs

Exhibit A, 1000

Exhibit A, 1000

Exhibit A, 1000

of Whittier County a claim against the estate of Harry P. Allen, for the sum of \$100,000, in which from March 11, 1910, to February 10, 1911, at the rate of \$100 per week. There was a jury trial resulting in

the allowance of \$100,000 in favor of the claimant. On appeal to the circuit court there was another verdict and judgment in favor of the claimant. The case was then remanded to the circuit court for further proceedings.

The service were not rendered, and none of the value of claim. No criticism of the investigation shown to the jury. There is now complaint of rulings on evidence, but no final decision. In fact the family relation existed between the claimant and her father at the time the service were rendered, and that fact is not sufficient evidence to rebut the presumption arising from the relation that the service were rendered as a gratuity.

The claimant's two sons are Harry P. Allen and Allen with his family at Whittier, Wisconsin, about 1910. Prior to the fall of 1908, when they moved to Whittier, Wisconsin, and they resided until the claimant's death, about forty-eight years old at the time of her death, and had been a member of his family all his life. She had married about nineteen years before, and had her husband continued to live at the home of her parents for about eight years when she secured a divorce from her

husband, and thereafter continued to live at home. The services performed in the care of her mother were those of a nurse. There is much testimony in the record as to the kind, character and value of those services, which is discussed at some length in the argument; but inasmuch as there is no claim that the judgment is excessive, and counsel for appellant offered the claim in evidence on the trial for the purpose, as they say here, of preventing the jury from rendering a verdict larger than the demand, it seems unnecessary to further notice evidence going to show the value of the labor performed by the claimant. It is not disputed that Henry P. Allen would have been liable for the full amount claimed here had the services been performed by one not a member of his family. There is no dispute about the law. Counsel for appellant cite *Neish v Cannon*, 199 Ill. 319, in support of the proposition that the presumption arising from the family relation of gratuitous services must be rebutted by proof of an express contract to pay for the services, or by facts proven from which it appears that at the time the services were performed both parties understood and expected that there should be compensation therefor. No express contract is proven, and the question presented is whether the facts and circumstances shown by the evidence warranted the conclusion that the parties understood and expected compensation at the time the work was done.

It appears that Henry P. Allen during the time in question and for several years prior thereto was the head of a family of several members, - supporting a home in the usual manner in which such homes are supported and conducted; that his wife required and received from appellee the care and attention of a nurse, and had received from her such care and attention for several years prior to March 10, 1908, the

date from and after which payment is demanded in this suit. On that date Henry P. Allen, his wife joining with him, signed and delivered to claimant a promissory note for the principal sum of \$3000 without interest, "to be paid when the farm is sold." The note was in the ordinary form, reciting that it was given "for value received". It is quite clear that Allen had received no value from his daughter except the care and attention she had given his wife, and that such care and attention up to that time had been of a very considerable value. It is to be noted that the services for which pay is here claimed do not cover the period for which claimant assumes that note was given. It appears that the farm was not sold in the lifetime of Henry P. Allen, and appellant says the note is void and not collectible. The note and the transaction connected with it is only sufficient in this case as tending to show that at the time it was given, if not before, the claimant and her father both understood that the services which she was performing were not gratuitous. It further appears that during Mr. Allen's last sickness he told the claimant to get a lawyer that he wanted to deed the farm to her, - wanted to pay her for what she had done and was doing for her mother and him. She told him to wait until to-morrow and maybe he would then feel better. He died without executing the deed. Appellee claims that these two transactions support a legitimate inference that her services were performed with the expectation and understanding that they were to be compensated, and especially when taken in connection with the fact that the services were of an extraordinary nature. There is no effort on the part of either counsel to much cite or review the cases where questions have arisen as to inferences to be drawn from facts of this nature, and we will not undertake to discuss them. It seems, as matter of common knowledge and

into them and after which papers are returned to them.

On first late Henry O. Allen, his wife (deceased) and

signed and delivered to principal - Henry O. Allen, his

principal sum of \$3000.00, interest, "to be paid" - the

term is "cash". The note was in the full pay form, containing

that it was given "for value received". It is stated that

that Allen had received no value from his daughter, except the

care and attention she had given his wife, and that such

care and attention up to that time had been of a very considerable

value. It is to be noted that the services for which

pay is here claimed do not cover the period for which Allen

assumes that note was given. It appears that the note was not

paid in the lifetime of Henry O. Allen, and that it was

the note is very much not collectible. The note and the

transaction connected with it is only mentioned in this case

as tending to show that at the time it was given, it was clear

the claimant had not at that time intended that the services

which she was performing were not gratuitous. It further

appears that during Mr. Allen's last illness he made the

claimant to get a lawyer that he wanted to leave her some

money - wanted to pay her for what she had done and was doing

for her mother and him. She told him to wait until to-morrow

and says he would then feel better. He died without executing

the deed. Appelles claim that there are two transactions whereby

a legitimate inference that her services were rendered

with the expectation and understanding that money would be paid

compensated, and especially when taken in connection with

the fact that the services were of an extraordinary nature.

There is no effort on the part of either counsel to show that

or review the cases where questions have arisen as to inference

to be drawn from facts of this nature, and we will not undertake

to discuss them. It seems, as matter of course, that the

observation, that services of an extraordinary nature performed by a member of the family would more naturally suggest that payment was intended than would the ordinary every day household duties. It is also claimed by appellee that the fact of her marriage and continued residence at home thereafter has an important bearing on the question. We had occasion to pass on the legal effect of the marriage of the claimant as affecting the presumption of gratuitous services in *Laymon v Estate of Henry Francis* in an opinion filed October 1918, ----App. ----, and concluded that the marriage did not, as matter of law dissolve the family relation and remove the presumption arising therefrom. But it is no doubt a circumstance to be considered together with all the other facts and circumstances in evidence in determining what the intention of the parties was. It is also claimed by appellee that the appellant in offering the claim in evidence did something equivalent to calling appellee as a witness, and was bound by the statements in the claim. Appellant answers, as before noted, that the only purpose was to keep the jury from returning a verdict beyond the amount of the claim. We do not regard it necessary to consider or discuss this position. We conclude that the facts connected with the giving of the \$3000 note and the declaration of Henry P. Allen that he wished to convey the farm to his daughter in consideration of services she had rendered her mother and him viewed in the light of the other proven facts are sufficient to justify the fair inference that the services here claimed for were rendered with the expectation on the part of the claimant and her father that they were to be compensated for in money or something of value; that the presumption of gratuitous services arising from the family relation is fairly rebutted.

The presumption of fraudulent services arising from the family relationship is fairly rebutted.

Appellant claims that the court erred in admitting the note in evidence, and in admitting proof of services rendered prior to the date of the note. We think this evidence was competent for the purpose for which it was offered; that is, as tending to show whether the parties at that time were ~~engaged~~ regarding the kind of service as rendered gratuitously. Suppose the claimant had performed just ten weeks' labor of a peculiar nature for her father and he had given her \$100.00 telling her at the time that he had received from her that value. If there was proof that he had received no other value from her the conclusion would not only legitimately but necessarily follow that he was attempting to pay her \$10.00 a week for that service, and both parties would expect that the same kind of service thereafter was not gratuitous. This note and proof of what it was given for was properly admissible on that principle to show the mental attitude of the parties whether it is or not collectible.

We assume the jury were properly instructed. No complaint is made of that, and the instructions are not abstracted. Some of the dates in the abstract and briefs indicate that the period charges for extended some months after Henry P. Allen's death. Of course, the estate is not liable for services performed after Mr. Allen's death; but no mention is made of this in the briefs, and we assume there is a mistake in the printed dates, and if not, there is no question had the point been raised in the trial court and the claim amended in that respect the evidence fully supports a larger verdict than was rendered. There is no suggestion of the statute of limitations, and we do not consider any defense that might have been made on that ground. On the merits of the case the verdict and judgment is clearly not excessive, even had such defenses been successfully made. Finding no error in the record, the judgment is affirmed.

Affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT.

{ SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

1952

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October,
in the year of our Lord one thousand nine hundred and nine-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

CURT S. AYERS, Sheriff.

215 I.A. 653

BE IT REMEMBERED, that afterwards, to-wit: on October
14, 1919, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6696

215 I.A. 653

Joseph N. Hill, appellee

vs

Appeal from Henry.

Dorothy Sten, appellant.

Carnea, J.

Dorothy Sten, the appellant, entered into articles of agreement with one Herman Sandgren July 25, 1914, for the sale of a lot in the city of Moline for \$4000., \$500 cash in hand, and \$30 a month thereafter until the purchase price with interest was paid. The contract was in the usual form providing that the time of payment was of the essence of the contract, and in case of failure that the contract might be forfeited and determined at the election of the grantor, and all payments on said contract forfeited and retained by the grantor in full satisfaction and liquidation of damages. The vendee took and retained possession of the premises for about fifteen months, being in possession by his tenant in November 1914, when he was in arrear \$193. in the stipulated payments and the vendor notified the tenant in possession not to pay the vendee any rent, but to pay it to the bank; and on the 25th. of that month the attorneys for the vendor mailed to the vendee a letter as follows:

"November 25th. 1914.

To-day we notified the tenant to not pay you any more money for rent, as Mrs. Sten has declared the contract forfeited, and hereafter the rent will be paid to the bank for Mrs. Sten. We will give you a chance, however, to redeem the place any time within three months, by paying all back payments that are due, together with accrued interest.

Yours very truly,

J. B. & J. L. Oakleaf

By J.B.O."

211A 553

Case No. 100

Joseph M. Hill, Plaintiff

vs

Dorothy Stein, Defendant

Carney, J.

Dorothy Stein, the defendant, admits that she entered into an agreement with the plaintiff on or about May 25, 1934, for the sale of a lot in the City of Boston, the lot being in and to the south of the lot owned by the plaintiff with interest was paid. The contract was in the usual form providing that the time of payment was to be within 30 days of the contract, and in case of failure to pay the contract was to be forfeited and the balance of the purchase price was to be paid by the plaintiff on or about the 1st day of June, 1934. The plaintiff in full satisfaction of the contract of purchase the vendor took and retained possession of the lot for about fifteen months, during the possession by the vendor in December, 1934, when it was in error filed in the plaintiff's name and the vendor notified the vendor in possession to do so. The vendor any part, but to pay it to the plaintiff; and on the 25th of June 1934 the plaintiff for the lot was sold to the vendor as follows:

"November 20th, 1934."

To-day we notified the vendor to not pay the lot money for rent, as the lot was sold to the plaintiff. The plaintiff and the vendor will be paid to the plaintiff for the lot. We will give you a chance, however, to pay the lot money. This within three months, by paying the lot money to the plaintiff, together with interest.

Yours very truly,

J. M. Hill, Plaintiff

By J. M. Hill

But no further payments were made by or for him, and November 7, 1917, by assignment written on the contract, he transferred to the appellee, Joseph N. Hill, all his rights acquired under said contract. This suit is assumed to be brought by the assignee to recover moneys paid by the original vendee to the vendor, with interest thereon. It was tried before the court without a jury on a declaration which, as amended during the trial, was framed to cover any right that appellee might have as assignee of the written contract, or as assignee of a chose in action not negotiable, which he might sue for in his own name under section 18 of our Practice Act. Appellant pleaded the general issue. The amount so paid by the vendee was stipulated. The contract and assignment was introduced in evidence. Sandgren testified as to the consideration for the assignment that he owed appellee, his father-in-law, \$600, that appellee paid him \$50. and he told appellee that he could apply his collection from appellant on the debt. Appellant testified that she saw Sandgren soon after she had told her attorneys to forfeit the contract; that he told her that he had received a letter from her attorney saying he would lose his property - it was forfeited, and he said he wanted some of the money back; and she asked him why he didn't sell the property, and he said he could not; and she told him he ought to have sold it and got what he could, and that she had not since met or heard from Sandgren and she had kept possession of the place. She said she knew Sandgren was given three months further time and understood that the contract was forfeited, and no further notice was necessary, and she took no further action. Appellant's attorney testified that Sandgren came into his office about December 1, 1914, and he

told Sandgren he could have three months time to pay up, as shown by the letter, and he said he could not do that; he would have to give up the place. The court rendered a judgment for \$524.78 in favor of appellee, which appellant in her original brief says was obtained by "deducting from the amount paid plus interest the sum agreed upon as the rental value of the premises during the time vendee was in possession." There is no suggestion in that brief that this judgment is excessive. In the reply brief it is for the first time suggested that there was a mistake in computation of interest. We are not referred to any place in the abstract where it may be learned how or on what basis the computation was made. The abstract, like the first brief, was apparently made on the theory that no such defense would be attempted. Therefore, there is no question of excessive judgment presented here. The letter in substance advised the vendee that the vendor would suspend for three months the time clause authorizing a forfeiture; that she would grant him a temporary indulgence. Under the authority of *Eaton v Schneider*, 185 Ill. 508, and cases there cited, she could not afterwards insist upon a forfeiture without giving him definite and specific notice of an intention to that effect, which it is not claimed she did. The letter amounted to a modification of the original contract in one particular only; that is, fixing a time different from that named in the contract when payment might be made and forfeiture avoided. There is no contention or room for contention that a vendor may, without notice to the vendee declare a forfeiture because payments are not made when provided in the original contract. We see no reason why that familiar rule requiring notice should not apply to the modified contract.

told Swadlow that he would have to give up the right to pay up,
 as shown by the letter, and he said he would not do that;
 he would have to give up the right. The court then
 judgment for Swadlow in favor of the plaintiff, which was
 in her original case. The court said that the plaintiff's
 the amount will pay interest for the period on the value
 value of the property during the time it was in possession.
 There is no suggestion in the letter that the plaintiff is
 excessive. In the letter itself it is the first time
 suggested that there was a mistake in computation of interest.
 To be not referred to any place in the letter itself is not
 to be learned now or on what basis the computation was made.
 The court, like the first judge, said that the plaintiff was to be
 theory that no such defense would be available. Therefore,
 there is no question of excessive judgment. The court said
 The letter in question is dated the 1st of the month.
 would suspend for three months the time for commencing
 therefore; that the court would give a summary judgment.
 Under the authority of *Wainwright v. Minter*, 121 Ill. 402, and
 cases there cited, the court held that the plaintiff was to be
 Tortfeasor without giving him notice and opportunity to answer
 of an intention to sue, which it is not entitled to
 did. The letter amounted to a declaration of the plaintiff's
 contract in one particular only; that is, that the plaintiff
 intent from the time of the contract with the plaintiff's right to
 make and therefore avoided. There is no intention to avoid
 for contention that a contract was made without notice to the plaintiff
 isolate a plaintiff's right to sue for damages. The court said that
 voided in the original contract. It was not voided by the
 familiar rule relating to the plaintiff's right to sue.

A similar question arose in *Lang v Hedenberg*, 277 Ill. 363, where there was a temporary extension of the time for making the cash deposit by the purchaser, and then a notice served fixing a date in the future as the time when the deposit must be made, or the contract forfeited. It was not presumed there that the contract would stand forfeited at that date without further notice; but after the expiration of the time, as extended, notice of the election to declare the contract forfeited and retain payments made as liquidated damages was served.

Appellees contention is that no forfeiture was declared by appellant, but that her taking possession of the property and declarations connected therewith amounted to a refusal on her part to perform the contract; that under the authority of *Smith vs Treet*, 234 Ill. 553, it left the vendee and his assignee in position, if they chose, to treat the contract as abandoned and sue for the consideration paid; that it is not material whether appellee's rights rest on the vendee's written assignment of the contract or on an assignment of a chose in action; and there being no question here of excessive judgment it is not material when the vendee acquiesced in the abandonment of the contract after the ~~xxxxxx~~ vendor declared an intention not to perform it. Appellant's main contention is that the contract stood forfeited without notice after the expiration of said three months' period, which we have sufficiently noticed. She also says there is no evidence of an assignment by the vendee to appellee of a chose in action if he had one, and that appellee within the three months period declared he could not perform his part of the contract. We think there is sufficient evidence of an assignment of the chose in action to appellee, and we do not think the vendee's

A similar question arises in *Levy v. Levy*, 111 Ill. 2d 111, 358 N.E.2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

statement while the contract, as modified, was in force that he could not make the payments relieved aellant of the duty to give him notice of a forfeiture. Had the vendee stated when he signed the original contract, or within a month thereafter, that he never would be able to make all the payments provided for, we do not suppose any one would contend that his rights could be forfeited without notice because of that statement. He would still be left to make full payments if he could, and with his rights preserved until the contract was declared forfeited and notice to him of such forfeiture.

We do not think the trial court erred in its findings therefore the judgment is affirmed.

Affirmed.

statement while the contract, as written, was in force that he could not take a payment involved in the contract to give him notice of a default. And he was asked when he signed the original contract, or while it was in force, that he never would be able to give him the payment involved in the contract, or he would not be able to give him notice of that statement. He would still be able to give him pay when it he could, and while the contract was in force until the contract was no longer enforceable and notice to him of such enforcement.

We do not think the trial court acted in its discretion therefore the judgment is reversed.

Reversed.

STATE OF ILLINOIS, } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT. Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October,
in the year of our Lord one thousand nine hundred and nine-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

CURT S. AYERS, Sheriff.

215 I.A. 653

BE IT REMEMBERED, that afterwards, to-wit: on October
14, 1919, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Jacob H. Krause,

215 I.A. 653

-vs- Appellant,

Appeal from Winnebago.

David Goldman, et al,

Appellees.

Dibell, J.

On June 3, 1918, Jacob H. Krause, filed a bill for an injunction against David Goldman and his wife, Anna Goldman. A motion for a temporary injunction was heard and denied. Thereafter, defendant filed a general and special demurrer to the bill of complaint, which was sustained. Complainant elected to abide by his bill of complaint, and it was dismissed for want of equity at his costs, and he prosecuted this appeal, and assigns for error the sustaining of the demurrer, the dismissal of the bill, and the judgment for costs.

The bill alleged that Goldman owned and conducted a ~~ji~~ junk business at the corner of Prairie and North Madison Streets in Rockford, and on October 6, 1918, made a contract with Krause by which Goldman contracted to sell to Krause, and Krause contracted to buy, said junk business and the good will thereof. Said contract was made part of the bill ^{as} exhibit. By it Goldman contracted to sell and Krause to buy all leases held by Goldman on certain real estate and the buildings and equipment thereon, and the tools, machinery, horses, harness, wagons and the good will of the junk business, located as aforesaid, and all contracts for

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[illegible]

junk from customers in which Goldman was interested, reserving, however, to Goldman all his stock of junk on hand or in said yards, and the right to operate said yards till January 1, 1917, and all money advanced to his customers beyond January 1, 1917, but not to make new contracts beyond January 1, 1917. The consideration named was \$15,000. partly in cash and partly in instalments running for five years. The property was to be delivered January 1, 1917. Goldman was to enter the employ of Krause on that date and remain in his employ three years, for which he was to receive \$35. per week as wages, payable weekly. It was provided that if Goldman died during said period, Krause should be relieved from paying him wages, and if Goldman should be absent by consent of Krause, his weekly wages should cease during the absence. For said wages Goldman was to give his entire time and attention to buying and selling junk under the direction and supervision of Krause, but not to travel outside of Rockford more than once a week. The contract provided that Goldman during said entire period of employment should have the right to use and occupy room and space for two carloads of new metal or more space if necessary, free of charge by Krause, and Krause was to provide said space at all times upon said premises, but not to interfere with the junk business of Krause. Goldman therein agreed that for a period of twelve years from January 1, 1917, within a radius of twenty-five miles from Rockford, he would not directly or indirectly, engaged in ~~competant~~ competition with Krause in the junk business. It was provided that if Goldman wilfully violated said last named covenant, he would pay to Krause \$500. for every car of junk bought or sold in violation of that covenant, and that said sum should be paid by Goldman as liquidated damages and not as a penalty; and that if Goldman wilfully violated the terms of his employment, he would pay Krause therefor at the rate of \$2000.

from first encounter to when he was in the hospital, and
however, to Goldman, it was not until he was in the hospital
and the right to custody was given to him, that he was
money advanced to him, and he was in the hospital, and he
were not until he was in the hospital, and he was in the
was \$15,000. He was in the hospital, and he was in the
for five years. The money was to be delivered January 1, 1917.
Goldman was to enter the money at once and to give him
in his early days, and he was in the hospital, and he was
as much as possible. It was in the hospital, and he was
and he Goldman should be given the money at once, and he was
water should cease during the winter. The money should be
to give the entire sum to Goldman in January, and he was
under the direction and supervision of Goldman, and he was
outside of Goldman's control, and he was in the hospital,
that Goldman said he was in the hospital, and he was in the
right to the money, and he was in the hospital, and he was
or were good if necessary, and he was in the hospital, and he was
way to give the money to Goldman, and he was in the hospital,
to interfere with the money, and he was in the hospital,
agreed that for a period of five years, from January 1, 1917,
within a period of twenty-five years from January 1, 1917,
directly or indirectly, or in any way, or in any manner,
in the bank business. It was agreed that if Goldman should
violated said last word, he would pay to Goldman \$100,000.
for every car of bank bought or sold in violation of the agreement,
and that said sum should be paid to Goldman or his heirs, and
not be a penalty; and that if Goldman should violate the terms
of his agreement, he would pay to Goldman \$100,000.

per year for each year's violation or fraction thereof, and that said sums so liable to be paid by Goldman, should be held as liquidated damages and not as a penalty in each case. The contract further provided that Goldman should have the right at all times while in such employment to buy or sell or deal in "all new metals, malleable iron, railroad rails, and scrap cast iron"; and that said reservation should not in any manner enter into competition with the local junk business of Krause in Rockford. The bill further alleged that on December 28, 1916, Goldman and Krause made an additional agreement by which his salary was raised to \$50. per week and 25% of all the net profits derived from all business transacted with eleven specified companies doing business in Rockford; and that if Goldman wished to terminate his employment at the expiration of twenty-four months Krause waived the penalty of \$2000. per year, and that at such termination of employment all contracts held and owned by Goldman should become the property of Krause; and the twelve year restriction was reduced to ten years. The bill alleged that Krause performed his part of the contract and took possession of the premises in January 1, 1917, and that on January 13, 1917, the parties executed another amendment to the contract, wherein Goldman's salary was increased to \$100. per week, and the twelve year restriction was reduced to five years; and the bill averred that Krause paid to said Goldman said salary of \$100 per week, and that his services were worth very much less. The bill then alleged that Goldman utterly failed to perform his duties as an employee, and failed to inform Krause of the details of the business which Goldman conducted, and worked against the interests of Krause, and altered bills and invoices of junk by inserting his name instead of that of Krause, and refused

to use the teams and wagon and men of Krause in hauling junk; and that when Krause objected to that Goldman removed from the harness and equipment all name plates, and that Goldman sold junk cheaper than Krause permitted, and bought junk at a higher price than Krause permitted. The bill further alleged that since January 1, 1917, Goldman purchased the premises on Kishwaukee street in Rockford, and equipped them for the junk business, and placed the title to the real estate in his wife, Mrs. Goldman; that after equipping said other junk plant Goldman bought from various persons named, either in Rockford or within the forbidden radius therefrom, many carloads of junk specified in the bill, and caused the same to be delivered at his own yards on Kishwaukee street and is there conducting the junk business in competition with Krause and in violation of said covenants, to the great injury of the business conducted by Krause. The prayer was that Goldman be restrained for said period of five years from conducting either in his own name or in the name of his wife a junk business in competition with Krause in Rockford, or within twenty-five miles therefrom, and from interfering with the junk business of Krause and from attempting to take over any contracts which Krause purchased from him or which have been acquired by Goldman since entering the employment of Krause, and which have been taken on behalf of Krause, and that Goldman may be required to disclose and turn over to Krause all contracts with customers covered by said contract or acquired by Goldman while in the employ of Krause, and that Goldman be required to account for all properties and profits while conducting a junk business in the employ of Krause.

There is in the bill no denial that Krause has an adequate remedy at law. There is in the bill no allegation that the purchases of junk made by Goldman were not of the kind of material which the contract expressly permitted Goldman to buy (or) sell on his own account. But further, the contract expressly fixed the prices which Goldman should pay for wilful violations of the contract. It provided that if he bought or sold junk in violation of the contract, he should pay Krause \$300 for each and every carload of such junk, and that if he wilfully violated the terms of his employment for Krause, he should pay Krause at the rate of \$2000 per year for the time when he so violated said contract. The contract expressly provided that each of said sums should be paid as liquidated damages and not as a penalty. The parties were competent to agree between themselves what would be the amount Krause would lose on each carload of junk handled by Goldman, in violation of the contract, and what would be a reasonable compensation to Krause for the failure of Goldman to remain in his employment. It is not charged that the damages so fixed were unreasonable or unjust to Krause, and it is obvious that it might be difficult in either case to determine exactly what his loss was. In such contracts the stipulated sum will not be held to be a penalty where it is clear from a consideration of the whole instrument and the circumstances surrounding the parties that the parties intended the sums named as the measure of compensation in case of a breach of the contract. Complainant, therefore, has an adequate remedy at law under B. & R. Brewing Co. v. Modzelewski, 269 Ill. 539, which we deem decisive of the question in this state. It is not necessary, therefore, to review the cases cited from other jurisdictions, which appellant finds take a different view

of the law.

The affidavit attached to the bill of complaint was insufficient to authorize a temporary injunction, but that point has no bearing on the question whether the bill stated a case which would authorize a permanent injunction on a final hearing. The decree is therefore affirmed.

STATE OF ILLINOIS, { SS. I. CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in
SECOND DISTRICT. }
and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

6002
15002
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October,
in the year of our Lord one thousand nine hundred and nine-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

CURT S. AYERS, Sheriff.

215 I.A. 654

AN Bond Nov 21/19

BE IT REMEMBERED, that afterwards, to-wit: on October
14, 1919, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

6691.

30.

Herman Johnson,
-vs- appellee,

215 I.A. 654

Appeal from Winnebago.

Rockford Malleable
Iron Works,
appellant.

Dibell, J.

On November 1, 1916, Herman Johnson was seriously injured while at work at the factory for his employer, Rockford Malleable Iron Works, a corporation, and he brought suit against his employer to recover damages for said injuries. He filed a declaration containing one count, which alleged that as a worker in said factory he was engaged in assisting another workman to transport certain castings from one place in said plant to another place therein; that a large truck was negligently furnished by defendant for that purpose and used by plaintiff, which truck was so evenly balanced that when heavily loaded it was liable to tip forward; that defendant negligently permitted a hole to be in the floor over which plaintiff was required to push or pull said truck; that said truck was heavily loaded, and while he was pulling and the other workman was pushing said truck, the wheels dropped into the hole and thereby caused the truck to tip forward, and that said truck and many of the castings fell upon plaintiff, and certain of his bones were broken, and that he was otherwise injured. It also averred that defendant prior to said injury had elected not to be bound by the provisions of the Workman's Compensation Act. This latter allegation was proved and not disputed. By section 3 of said act, as amended in 1915, and in

force at the time of this injury, defendant was deprived of the defenses of assumed risk, negligence of a fellow servant, and contributory negligence by plaintiff. There was a jury trial, and a verdict and a judgment for plaintiff for \$3,500, from which defendant appeals.

The evidence authorized the jury to find the following facts: Defendant had in its plant two kinds of trucks for carrying such castings about the plant. One was light and carried but a light load and was intended to be operated by one man, and that was the only truck plaintiff had ever used for that purpose during his eight years of employment with defendant. Another truck was larger and carried heavier loads and was intended to be operated by two men, one pushing from behind and the other pulling in front. Plaintiff and one Castellese were working together under a sub-foreman named Robinson. Robinson ordered these men to get a truck and move certain castings, which weighed six or seven pounds apiece and were called "rollers", from that room to certain other room. The only truck then in said room was one of these large trucks. Castellese brought that truck where the castings were and the two of them loaded it. Robinson was a few feet away and the whole business of getting and of loading that truck was conducted in his presence, and he then weighed the truck and contents on scales near by. They then started with the truck, plaintiff in front of it with his hands behind him, pulling the truck, and Castellese pushing it. There was a leg under the rear of the truck which would prevent it from tipping backward, but nothing in front to prevent it tipping forward. They passed through a doorway into the next room. The floor of that room was slightly lower than that of the room from which they came. They passed down a slight and gradual incline. At the foot of this in-

cline there was a hole or depression in the concrete floor, six or eight feet long, one and one-half or two inches deep, and four or five inches wide. One of the wheels of the truck went into this depression and the truck tipped forward and the rollers fell upon plaintiff's right ankle and crushed it. If the jury found these facts established they made the case stated in the declaration and justified a verdict for plaintiff.

Plaintiff alone testified to the presence of his foreman, Robinson, when the truck was obtained and loaded and weighed. Robinson testified that he left the room immediately after giving the order and did not see the truck used or the load, and did not weigh it. Defendant assumes that therefore that part of plaintiff's case was not proven. The jury may have seen that in Robinson's demeanor on the stand and manner of testifying, as compared with that of plaintiff, which caused them to believe plaintiff. They had a right to believe one witness instead of the other, and it does not necessarily follow that plaintiff failed to establish that part of his case. There was no denial that defendant used the large truck as well as the small one in removing castings, and that the large truck was the only one in that room at the time the order was given, and that plaintiff had never used the large truck before. Plaintiff testified to the existence and character of the hole or depression in the floor of the second room and so did Ryder who visited the place with plaintiff on Sunday between three and four months later when the undisputed proof is that the floor was in the same condition as at the time of the accident. Castellese, a witness for defendant, testifying through an interpreter, at first denied that there was a hole there, but on cross examination (not fully brought out in the

about there was a hole or something in the window blind, and
or eight feet long, one end on a shelf or two inches deep, and four
or five inches wide. One of the ends of the plank went into the
depression and the trunk tippen against the wall and the other
plaintiff's right side as shown in the jury room. The
facts established that the hole was in the depression and
that it was a verdict for plaintiff.

Plaintiff also testified in the room in his presence,
Robertson, that the trunk was damaged and broken and damaged.
Robertson testified that he left the trunk in the room, and that
the trunk was not and the trunk was on the floor, and that
weight it. Plaintiff testified that the trunk was not in the room
case was not proven. The jury was told that in Robertson's
depression on the stand and on the evidence, he testified with
of plaintiff, which caused him to believe plaintiff. The
right to believe one witness over another on the same facts, and it was not
necessarily follow that plaintiff's belief is established that one of his
case. There was no other evidence that the trunk was well
in the room and in the room of plaintiff, and that the trunk was
the only one in the room at the time the trunk was in the room.
Plaintiff had never used the trunk before. Plaintiff testified
to the existence of the hole in the wall in the room
of the trunk from the fact that the trunk was in the room
plaintiff on Sunday between three and four o'clock in the afternoon
undoubtedly that it was the floor was in the room and on the
the time of the accident. Plaintiff's witness for defendant,
testifying through an interpreter, at first denied that there was a
hole there, but on cross examination (not fully shown) said it

abstract) testified that there was a hole or depression at that place. This was denied by Ferns, head foreman, Robinson was a witness for defendant, but was not asked as to the existence of this hole or depression. The jury could hardly fail to find for plaintiff on this question. No one testified that the existence of this depression was the direct cause of the dumping of the castings and of the injury to plaintiff, but the jury could reasonably infer that from the facts proven. A verdict for plaintiff was warranted by the evidence.

Defendant complains of two instructions given for plaintiff. They are not numbered and are too lengthy to be inserted here. It is claimed that one of them assumes certain facts as proven. Before that part of the instruction it twice used the expression, "If you believe from a preponderance of the evidence." It was not necessary to repeat that expression before each one of the separate facts stated in the instruction, as held in numerous cases, including Ladd v. Pigott, 114 Ill. 647; Gerke v. Fancher, 158 Ill. 375; Fitzgerald v. Benner, 219 Ill. 485; and Schmidt v. Kurrus, 234 Ill. 578. The other instruction given for plaintiff authorized the jury to find for plaintiff if they believed from the preponderance of the evidence that plaintiff was injured and that said injury was the direct result of an accident and of defendant's negligence as charged in the declaration. This is supported by Commonwealth Electric Co. v. Rose, 214 Ill. 545. It is to be remembered that if Castellke was also negligent or if the incline was wide enough so that plaintiff could have kept out of the hole, still the negligence of the fellow servant and the contributory negligence, if any, of plaintiff, are not defenses available here.

It is claimed the damages are excessive. Defendant filed points upon its motion for a new trial and did not therein allege that the damages were excessive. That point is thereby waived. *Odin Coal Co., v. Tadlock*, 210 Ill. 624. It did state that the verdict was contrary to the evidence and the law, but that did not present this question. *C.L.C. & N. Ry. Co., v. Cukravony*, 132 Ill. App. 367. But we do not regard the damages as excessive. Two bones of plaintiff's ankle were broken. One of them projected through the flesh at the time of trial. He suffered much pain. He could not thereafter do any work which required him to stand long upon his feet. He was able to earn thereafter much less wages than before the injury.

We find no reversible error in the record and the judgment is therefore affirmed.

It is believed that the...
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STATE OF ILLINOIS, {
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

61325 8012

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October,
in the year of our Lord one thousand nine hundred and nine-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

CURT S. AYERS, Sheriff.

215 I.A. 654

BE IT REMEMBERED, that afterwards, to-wit: on

OCT 9 1909

the opinion of the Court was filed in

the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6625

Catherine Risk, appellant.

215 I.A. 654

vs

Appeal from Peoria.

Albert Sleyman, appellee

Niehause, P. J.

The appellant Catherine Risk, brought this suit in the circuit court of Peoria County, against Albert Sleyman the appellee, for an alleged breach of promise to marry her; claiming also that the appellee seduced her under the alleged promise of marriage; and laying her damages in the sum of \$35,000.00. There was a trial by jury which resulted in a verdict for the appellee, on which the court rendered judgment in bar; and from this judgment an appeal is now prosecuted.

The appellant was a witness in her own behalf, and testified that she was a resident of Charlestown, West Virginia; that she was a Syrian by birth, and first came to this country when about four years of age; that she afterwards returned to Syria, but again came to America, when about eleven years old to live with her brother at Fort Wayne, Indiana; and that she lived with him there about eight months; that she and her brother went about through the country peddling goods; that at the age of fourteen she was married to a man in Fort Wayne Indiana, but lived with him only four days; and that afterwards he obtained a divorce from her. That after ~~xxx lived~~ that she lived with her brother at Spencerville, Ohio, clerking for her brother until he sold out his store, and then she and her brother went out on the road again peddling through Ohio and Indiana at different places. Finally at the instance of another brother, she went to Charlestown, West Virginia, first clerking in a dry goods store, and then again went out to peddle fancy work, oriental work, and different kinds of laces which she

carried in a suit case. And she was living in Charlestown with her brother, when she met the appellee, Albert Sleyman and she claims that very shortly after she had become acquainted with him, he wrote a letter requesting her to come to his store, which she finally did; and that afterwards he made various other appointments with her at Charlestown; that on his solicitation she went to his room in Charlestown several times and that in his rooms at Charlestown he repeatedly promised to marry her, and also had sexual intercourse with her; that afterwards she went to him at his request at Gallipolis Ohio, and that he promised to marry her there; that she stayed with him several days and that they ~~xxx~~ had sexual intercourse at that place; that afterwards she went to Wheeling West Virginia, and he promised to marry her at that place, and they had sexual intercourse, and lived there as man and wife. She also testified that he promised to marry her at different other places, including Rock Island, Davenport and Peoria; and that in Davenport and Rock Island they lived together as man and wife at the hotel and at private houses; and that he promised to marry her while she was visiting him at Peoria where he at that time was engaged in the oriental rug business; that he did not keep his promises to marry her at these various places giving one reason or another for not doing so; and that at Peoria he said he would come to Charlestown and marry her there and did not do so. The appellee denied, that he had ever made a promise of marriage to the appellant at any time; he also denied, that he had had sexual intercourse with her as testified to by her. The appellant is apparently corroborated by evidence going to show that she and the appellee lived together as man and wife in different localities, where the appellee had pursued his business in oriental rugs;

but upon the vital question in the case, as to whether there was any promise of marriage between the parties, the proof rests almost entirely upon the testimony of the respective parties. A number of postal cards and letters which passed between the parties through the mails, from the time of their first meeting to the time of her final visit at Peoria, were introduced in evidence and are attached to the record. There is nothing in this correspondence however from which the inference could reasonably be drawn that a promise of marriage existed, though they do present evidence of intimacy. In this state of the proof, it was clearly the province of the jury who are the judges of the credibility of witnesses, to determine which of the parties was most worthy of belief as to the promise of marriage. It is clear that the jury did not believe the appellant's testimony concerning the promises of marriage which she claimed had been made by the appellee; and under these circumstances the jury were warranted in finding the issues for the appellee. This court would not be justified in holding, that the jury should have taken the testimony of the appellant, as true, and that they should have regarded the testimony of appellee as untrue, and the finding of the jury upon the vital and contested question in the case cannot properly be held to be manifestly against the weight of the evidence, and should not be set aside on that ground.

Complaint is made about alleged improper remarks of counsel for appellee, both in the opening statement, and in the closing argument. Some of these remarks of which complaint is made, appear in an affidavit which was made by the appellant in support of her motion for a new trial; and some of the remarks objected to are set up in the Bill of Exceptions. Those set out in the affidavit are not properly before us for consideration because the affidavit is not made a part of the Bill

of Exceptions. What occurred in the presence of the judge at the trial of a case must be shown by his own statement in the Bill of Exceptions, and cannot be shown by affidavits. *People v Capello* 383 Ill. 548; *People v Cowan* 283 Ill. 308. The court sustained appellants objections to the remarks claimed to be improper which are set out in the bill of exceptions. And there is nothing in the record to show, that the jury considered the remarks of counsel which were ruled out by the court, nor does it appear that they could have had any material effect on the deliberations of the jury in determining the question whether or not there was a promise of marriage existing between these parties; and do not therefore furnish a proper basis for the reversal of the judgment.

Appellant argues that the court erred in allowing the deposition of W. G. Barnhart to be read. The reading of the deposition was objected to on the ground that the appellant had consulted Barnhart as her attorney, and therefore that the statements she made to him were privileged communications. But appellant did not offer to prove, in support of her objection that Barnhart was in fact the attorney of appellant at the time she made the statements in question to him. Nothing appears on the face of the deposition itself to prove that the conversations between the appellant and Barnhart testified about were had between attorney and client. Under these circumstances, the court properly overruled the objection, and allowed the deposition to be read. It is true, that the appellant, afterwards in rebuttal testified, that she had consulted Barnhart as attorney and that she had the conversation referred to with him as his client; but no motion was made after that to exclude Barnhart's evidence from the jury, and so the matter remained with the jury; and under these circumstances

appellant must be considered as having waived his right to have it excluded from the jury.

Objection was also made to a part of an answer which it is claimed was volunteered by the witness, namely, that the appellant in her conversation with Barnhart, never at any time stated, that the appellees had promised to marry her. No objection was made ~~xx this~~ to this at the time the deposition was taken by the appellant, who was represented at that hearing; and this objection should properly have been made at that time; but appellant should at least have raised the question before the trial, which he could have done by a motion to suppress the deposition or that part containing the answer which was objected to. In this way the appellee would have been given an opportunity to re-take the deposition and get the benefit of this evidence by propounding a proper interrogatory.

Appellant complains of the giving of several instructions for appellee; one instruction specially objected to, is to the effect, that if the jury believed from the evidence that there was a mutual promise of marriage between the parties, and that the sole and only consideration for such promise of marriage was sexual intercourse, then had, or to be had, that their verdict should be in favor of the appellee. Under the holding of the Supreme Court in July v Sterrett 153 Ill. 94, no error was committed in the giving of this instruction. Another instruction complained of is to the effect, that if the jury believe from the evidence that the appellant had been an inmate of a house of ill fame prior to the appellee's acquaintance with her, and that this fact was unknown to the appellee, and that he had entered into a mutual promise of marriage while ignorant of such fact, that in that state of the proof the appellant could not hold

100-443887-100

...and not believe it

OPTIONAL: Add a title to the document.

100-443887-100

Applicant is a conversion and a conversion

*TULSA COUNTY RECORDS DEPARTMENT, TULSA, OKLAHOMA

NO COPY TO BE MADE OF THIS DOCUMENT

7. 10. 1968

and a few other things that I thought I should tell you.

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1. The first of the two main points, regarding the future of the country, was the need for a new constitution. The speaker argued that the current constitution was outdated and did not reflect the needs of the people. He called for a new constitution that would be more democratic and representative of the population.

Under the holding of the Supreme Court in 1961, the following

100 Ill. 54, no error was committed in the failure to

Instructional materials

SECRET

Represented by: [Signature]

to the speaker's knowledge.

THE UNIVERSITY OF CHICAGO PRESS

NOTED PROBABLY

the appellee to such promise, unless the jury further believed from the evidence that he ratified such promise after he became cognizant of such alleged dereliction. The objection made to this instruction is, that there is no evidence whatever in the record that the appellant had been an inmate of a house of ill fame at any time. There is evidence in the record however, from the testimony of the appellee, namely, that appellant admitted to him in Peoria, that she had been in a house of ill fame. It is true that the appellant denied that she made this statement to the appellee, but the appellants denial merely made it a question for the jury, to determine which one of the parties they would believe.

We find no reversible error in the instructions given; nor any error in the rulings of the court; and the jury were warranted in determining the issue of fact as they did by their verdict. The judgment is therefore affirmed.

Judgment affirmed.

the evidence for each witness, which is the subject of the
 from the evidence that is presented. The object of
 become convinced of each witness's reliability. The object of
 made to this investigation is, to determine the reliability of
 over in the record of the witness and to determine
 of a history of all cases. There is nothing in
 record however, from the testimony of the witness, namely,
 that the witness is reliable, but it is not
 in a house of ill fame. It is not that the witness is
 that the witness is reliable, but the witness
 that the witness is reliable is a question for the jury, to
 determine which one of the parties is more reliable.
 It is not possible to determine the investigation
 given; not only error in the taking of the facts; but the jury
 were presented in testimony. The issue of fact is left to
 by their verdict. The witness is not reliable.

STATE OF ILLINOIS, { ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT. }
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and ____

Clerk of the Appellate Court.

(802)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October,
in the year of our Lord one thousand nine hundred and nine-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

CURT S. AYERS, Sheriff.

215 I.A. 654

BE IT REMEMBERED, that afterwards, to-wit: on

OCT 11 1919 the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6592.

Appendix 46.

Alvah G. Turner,

215 I.A. 654

Appellee,

-vs-

Appeal from circuit court

The Fox & Illinois
Union Railway Company,
Appellant.

Grundy county.

Nichaus, P.J.

Alvah G. Turner, the appellee, brought this suit in the circuit court of Grundy county against appellant, The Fox & Illinois Union Railway Company, to recover damages on account of personal injuries which he claims to have suffered because of alleged negligence of the appellant in the operation of an electric car on appellant's railroad upon which the appellee was riding as a passenger. The electric railroad in question is owned and operated by the appellant for the carriage of passengers and freight from and through the city of Morris, and Grundy county, to Yorkville in Kendall county. There was a trial by jury, and the case was submitted to the jury on the first original count, and the fourth amended count of the declaration, to which the appellant had pleaded the general issue. It is alleged in the first original count that the appellee became a passenger on the electric car in question to be carried from the south portion of the city of Morris to a street crossing at the corner of Lisbon and High streets; that it became the duty of the appellant upon the approach of said car to such crossing to slow down and stop and give the appellee an opportunity of alighting safely; but that the appellant did not regard its duty in that behalf and that while the appellee was preparing to alight with due care at said crossing, the

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appellant negligently and carelessly caused said car to be run at a high and dangerous rate of speed over and by said crossing whereby the appellee was thrown off of said car and upon the ground and injured.

The fourth additional count alleges that the appellee was a passenger upon the car in question to be carried to the crossing, referred to, and that it became the duty of the appellant upon approaching said crossing to slow down its car and stop the same at said crossing, so that the appellee could safely alight from the same. Yet the appellant, with full knowledge of its duty in that behalf, did not regard its duty, and did not use due care, but on the contrary as said car approached said crossing, and while the appellee was about to alight, carelessly, negligently, suddenly and violently, and without notice to the appellee, caused said car to increase its speed to a dangerous rate before the appellee had an opportunity to know of such conduct on the part of the appellant, and before he had an opportunity to alight from said car or protect himself against such increased speed, and that the appellee was thereby thrown off of said car, etc. The jury returned a verdict finding the appellant guilty and assessing appellee's damages at \$1500.00, whereupon the appellant made a motion for a new trial, also in arrest of judgment, which were overruled, and the court rendered judgment in accordance with the verdict, from which this appeal is prosecuted.

It is contended on appeal that the court should have directed a verdict for the appellant at the close of the evidence, and that it was error not to do so; also that the verdict is manifestly against the weight of the evidence; also that the giving of instruction No. 12

for the appellee was error. Appellant's position on the question of directing a verdict is to the effect that there is no evidence of negligence, on the part of appellant in the operation of the car in question and that the lurching of the car which appellee testified was the cause of his being thrown off, was only ordinary and incidental to the operation of running the car, for which appellant is not legally liable, and that the appellee was guilty of contributory negligence in that he voluntarily went to and descended upon the step of the car which was a place of danger, without invitation, and when the car was going merely at its usual speed between the crossings, and having thus voluntarily placed himself in a dangerous position he assumed the risk of being thrown off of the step and injured thereby. And this doctrine has been repeatedly held by the supreme and appellate courts, and that these courts have said in so many words that if a man places himself in such a position that in the ordinary movement and conduct of a train he is exposed to danger he may justly be said to be negligent of his security, and must take the consequences if he is injured. In support of this position appellant especially refers to the case of Sterling, Dixon & Eastern Electric Railway Co., v. Wise, 128 Ill.App.632, decided by this court, and in which this court distinctly recognizes the doctrine mentioned. While we fully agree with counsel that this doctrine is good law, and well established, it must be pointed out that there is a wide difference in the circumstances under which the party injured in the Wise case stood in the place of danger which resulted in his injury, and the present case; and that a different rule, hereafter referred to, therefore becomes applicable. The evidence in this case tends to show that the appellee, who was an iron molder, and had on the day of the injury

been working at his trade in the south part of the city of Morris, was on his way home, and boarded the car in question as a passenger to ride to the northern part of the city, namely, to the crossing at Lisbon and High streets, which was the nearest stopping off place to his home. The car line ran along Lisbon street, and at High street there was a curve by which the car was turned directly to the north. The appellee testified that the car was crowded with passengers and that the conductor was in the front end of the car taking fares when the car reached the last preceding stop before it got to Lisbon and High streets, and that when the car got to this stop, which was known as White Gate, two blocks south of High street, he went up to the conductor, paid his fare, and told him he wanted to get off at Lisbon and High streets, whereupon the conductor directed him to go back and get ready to get off; that thereupon he went back, elbowing his way through the crowd to the getting off place at the rear end of the car, and descended to the second step, getting hold of the hand hold with which the car was equipped at that place; that he had hold of this handle with his left hand and stood there expecting the car to come to a stop. When he reached the platform in going to the rear of the car seemed to be slacking up a little, and as it approached High street that it did not stop, however, but went right on, and as it reached the curve it gave a sudden lurch which threw him off. The curve referred to has a turn toward the right, so it is apparent that when a car would strike this curve the rear end of the car would naturally be thrown towards the west. The place of alighting was on the east side of the car, so that the effect of a lurch of the car would be to cause the rear end of the car and the step upon which appellee was standing to suddenly move towards the west and thereby have a tendency naturally to cause him to fall forward. The conductor denied that the

appellee told him he wanted to get off at High and Lisbon streets, and also denied that he told him to go back and get ready to get off. But the testimony of the appellee was corroborated by other witnesses in the case, who testified that they saw the appellee go forward to the conductor and pay his fare, and heard him say something to the conductor and that the conductor made some reply to him, and that thereupon the appellee made his way to the rear of the car. And with reference to the movements of the car the appellee was also corroborated. George Cochran, a witness for appellee, testified that the car was going at full speed but as it got towards the corner of High street it slowed down, and as it hit the curve it made a sudden lurch forward. Henry Sampson, also witness for appellee, testified that as appellee passed out on the platform to the step the car slowed down a little, and when the appellee got on the steps it moved a little faster until it reached High street, and the corner where all the way up there; and that when it hit High street, and the corner where the turn is made, Turner disappeared. On cross examination he testified that there was a sudden increasing of speed at the turn. In this state of the proof the jury were warranted in finding from the evidence that the appellee was on the step of the car for the purpose of alighting therefrom at the invitation and by the direction of the conductor, and that the conductor led him to believe that the car would be stopped at the crossing mentioned for that purpose. If he was there by the direction of the conductor, under the circumstances indicated, it is clear that it was the duty of the conductor to see to it that the car was stopped, and that it was the failure of the conductor to have the car stopped that made appellee's position more dangerous. If the car had stopped as appellee had a right to assume it would under these

circumstances apparently he would not have been thrown off. And the appellee attempting to follow the directions of the conductor upon whose assurance he had a right to rely by going upon and standing upon the step of the car for the purpose of alighting under the circumstances shown, cannot be legally charged with contributory negligence. Chicago & Alton R'y Co., v. Winters, 175 Ill. 293. It was held in B. & O.S. Ry. Co., v. Mullin, 217 Ill. 203, that the direction of the conductor of a train to an intending passenger as to his method of getting upon the train is clearly within the scope of his authority, and in complying with this direction the passenger is not guilty of contributory negligence unless he exposes himself to open and apparent danger. And the same rule applies to alighting from a train. We are of opinion that if appellant's conductor failed to stop the car under the circumstances which the evidence tends to prove, but allowed its speed to be increased instead of stopping, that appellant's conductor was not exercising that high degree of care and caution which the law requires a carrier of passengers to exercise for the safety and security of such passengers. Consolidated T. Co. v. Schritter, 222 Ill. 364; West Chicago Street R'y Co. v. Johnson, 130 Ill. 295; West Chicago Street R. Co., v. Kromshinski, 105 Ill. 92. And concerning the matter of damages we are of opinion that the amount fixed by the jury as damages for appellee was not excessive, taking into account the extent of the injuries as shown by the evidence and the pain and suffering resulting therefrom.

For the reasons stated it is clear that the court did not err in refusing to direct a verdict for appellant, and that the verdict of the jury cannot justly be regarded as against the weight of the evidence. But we are of opinion that error was committed in the

giving of instruction No.12 for appeal. The instruction is as follows:-

" The court instructs you that if you believe from the preponderance of the evidence and the facts and circumstances in evidence, that the defendant on the 30 day of February, 1917, was engaged as a common carrier of passengers, and that the plaintiff on said date boarded the car of the defendant and paid his fare to the conductor of the car, to be carried from the Commercial Hotel in the City of Morris, Illinois, to the corner of Lisbon and High streets, in the said City of Morris, and if you further believe, from the evidence and the facts and circumstances in evidence, that the defendant accepted said fare and had notice that the plaintiff desired to get off of said car at the said crossing of High and Lisbon streets, in said City of Morris, and if you further believe, from the evidence, that the defendant negligently and carelessly caused said car to be run by said crossing, and if you further believe, from the evidence, that by reason of said car being run at a high and dangerous rate of speed across the crossing where the plaintiff was to get off, the plaintiff was then and there thrown from said car, and if you further believe, from the evidence, that the plaintiff was injured by being thrown from said car, and if you further believe, from the evidence, that the plaintiff was in the exercise of due care and precaution for his own safety immediately prior to and at the time he was thrown from said car, then your verdict should be for the plaintiff."

The objections made to this instruction appear to be well taken. It assumes as a fact that the car in question was run at a high and dangerous rate of speed at the crossing where appellee was in-

study of instruction with the children. The instruction is

follows:-

The first question is: How is the child to be taught to read? The answer is: The child is to be taught to read by the method of the "phonetic method". This method is based on the fact that the child is a natural imitator and that he can learn to read by imitating the sounds of the letters and the words. The teacher should first teach the child the sounds of the letters and then the sounds of the words. The child should be encouraged to imitate the teacher's pronunciation of the letters and the words. The teacher should also use various aids such as pictures, objects, and gestures to help the child understand the meaning of the letters and the words. The child should be taught to read by the method of the "phonetic method" because it is the most natural and effective method for teaching a child to read. The child is a natural imitator and he can learn to read by imitating the sounds of the letters and the words. The teacher should first teach the child the sounds of the letters and then the sounds of the words. The child should be encouraged to imitate the teacher's pronunciation of the letters and the words. The teacher should also use various aids such as pictures, objects, and gestures to help the child understand the meaning of the letters and the words. The child should be taught to read by the method of the "phonetic method" because it is the most natural and effective method for teaching a child to read.

The object of this study is to find out how the child learns to read. It is a fact that the child is a natural imitator and that he can learn to read by imitating the sounds of the letters and the words. The teacher should first teach the child the sounds of the letters and then the sounds of the words. The child should be encouraged to imitate the teacher's pronunciation of the letters and the words. The teacher should also use various aids such as pictures, objects, and gestures to help the child understand the meaning of the letters and the words. The child should be taught to read by the method of the "phonetic method" because it is the most natural and effective method for teaching a child to read.

jured and would naturally be understood by the jury in that way. This was a question which should have been left for the determination of the jury. It also assumes as a matter of law that if the appellee wanted to get off at this crossing, and the appellant had notice of this, it was the duty of the company to stop there; but the evidence does not show that such a duty was incumbent upon the appellant. Another objection, which is fatal, to the instruction is, that it limits the exercise of due care on the part of the appellee for his own safety to a time immediately prior to the time when he was thrown from the car, which the jury would naturally conclude and understand to mean the time when he stood on the step, and this excludes the idea of the necessity of his having exercised due care, in putting himself in that position. These are vital defects, and it was therefore reversal error to have given the instruction to the jury.

Inasmuch as the case will have to be reversed, and remanded for another trial, it becomes necessary to consider the cross errors which have been assigned by the appellee. It appears from the record that during the trial the appellee offered to prove that on a number of occasions during the three or four months just prior to appellee's injury that he had been instructed by the conductors of this line to be up and ready at the door to get off at his crossing; and that on a number of occasions had been carried by his crossing a quarter of a mile before the car was brought to a stop; and that appellee had to walk back in the winter time to his corner, and that it was a custom of the appellant to require the passengers to get up from their seats and go to the rear platform and be ready to get off; and that other people in the same neighborhood had the same trouble. The court

sustained an objection to this offer. We are of opinion that the objection to the proposed proof taken as a whole was properly sustained. What occurred to the appellee at other times concerning the matter of his being carried by his crossing or being compelled to walk back, or what occurred to other people in that regard, was not competent as a matter of proof in this case. West Chicago St. R.R.Co., v.Thorpe, 187 Ill.510; Taylor Coal Co. v.Dawes, 220 Ill.145; Hackart v.Decatur Coal Co., 243 Ill.49; C.B.&N.E.R.Co. v.Lee, 60 Ill. 501; C.&A.Ry.Co.,v.Johnson, 123 Ill.App.20. We are of opinion that evidence of custom was competent under the third additional count of the declaration.

And we are also of opinion that the court erred in instructing the jury to find appellant not guilty under the first additional count of the declaration.

For the reason stated the judgment is reversed and the cause remanded for another trial.

Reversed and Remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

800

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October,
in the year of our Lord one thousand nine hundred and nine-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

CURT S. AYERS, Sheriff.

215 I.A. 654

BE IT REMEMBERED, that afterwards, to-wit: on

NOV 10 1919 the opinion of the Court was filed in

the Clerk's office of said Court, in the words and figures
following, to-wit:

Ca. No. 3653.

Gus Stavrakas, Pltf. in error.

215 I.A. 654

vs

Error to City Court DeKalb.

Nick Stavrakas, Deft. in error.

Niehau, P. J.

This is a suit brought in assumpsit by the plaintiff in error Gust Stavrakas, in the city court of DeKalb, against Nick Stavrakas defendant in error, to recover on a claim containing two items namely \$543.30 for money loaned, and \$800.00 for work performed for the defendant in error, making a total of \$1343.30. The claim was verified by affidavit of amount due which is attached to the declaration. On the second day of the term to which the suit was commenced, a default was entered against the defendant in error for want of a plea, and the plaintiff in error on the affidavit of claim obtained a judgment. This judgment however was subsequently vacated by agreement of the parties, who had entered into a stipulation whereby the defendant in error was given leave to plead to the declaration, and it was agreed in the stipulation that a hearing should be had in said cause on the merits; and a jury waived. The defendant in error thereupon filed a plea of the general issue, and a plea of set off, together with an affidavit of merits. Upon the issues thus made, the case was tried by the court; and the court found the issues in favor of the defendant in error, and rendered judgment in bars against the plaintiff in error, and for costs. From this judgment this writ of error is prosecuted.

It appears from the evidence, that the parties to this suit are brothers, who came to this country from Greece. Nick Stavrakas came here first; but soon afterwards Gust Stavrakas, who was the older brother, also came; then he went back to the old country to fight for the Balkan war. After that Nick sent Gust

money to again come to this country. The evidence shows that Nick advanced to his brother Gust different sums of money for various purposes at different times after he arrived here; and between the early part of 1914, to the later part of 1915; some of which sums so advanced were repaid, but most of them were not. Gust finally went to Detroit in March 1915, and got into the shoe shining and hat cleaning business with a man named Harry Thirkas. Nick furnished him \$300 for this purpose. Afterwards in July, he bought out his partner, and Nick furnished him the \$500 for that. He also furnished his brother other sums of money in connection with this business. In September 1915 Gust transferred the business to Nick by bill of sale; the consideration stated in the bill of sale was \$1500.00. According to Gust's testimony the real purpose of the transfer was to pay his brother Nick what he owed him, which he claims was \$1200.00 at that time. He testified that he said to Nick: "I have no cash to give you but I will sell you the store and then you can sell the store and get the money". And that Nick replied by saying: All very well, but who is going to run the store? Whereupon he (Gust) said: "The only thing I can do, I can stay here to run the place for you." Nick claims that he and Gust had an understanding that they would run the place in partnership, but, that it was to be run in his name; and in order that it might be run in that way, he gave his brother a power of attorney by which he could conduct the business in Nick's name. The business was afterwards conducted by Gust; and Nick sent to his brother various sums of money in connection with running the business. Finally it was closed out and sold in the spring of 1916, both brothers signing the papers transferring the business to the purchaser. The claim of Gust for wages is based upon his services in running the business at Detroit. The main controversy in the case ~~hinges~~ hinges on the question whether Gust was ~~employed~~ an employe of Nick, and as such en-

titled to wages, or whether he was a partner who was taking his chances of receiving pay for his work out of any profits that might result from the business; and there is a conflict in the testimony of the parties on this point. But the evidence clearly shows, that before the commencement of this suit after the business in Detroit had been disposed of by Nick, Gust came to DeKalb; and that the parties met and brought their papers and books; and in the presence of and with the aid of other Greek residents of DeKalb, went over the items of the claim in controversy, and they had an accounting, and settlement between them, which resulted in finding that there was \$12.00 due Gust; and this amount was paid by Nick to Gust. Some months afterwards Gust who apparently was not satisfied with the settlement, sought another settlement, and that thereupon the accounts between the parties were again gone over, and upon this occasion it was found that nothing was due Gust, but nevertheless Nick gave his brother \$50.00. From the testimony of the witnesses who were present and assisted in the accounting between the parties, it is established that the settlement was made on the basis, that Nick and Gust had been partners in running the business at Detroit; and we think that both parties were clearly bound by this settlement made on the basis indicated, not only on the question of partnership, but also on the question of what amount was due Gust on the account. But regardless of the legal effect of this settlement, the record does not show, that the claim of plaintiff in error was sustained by a preponderance of the evidence. The parties were apparently of equal credibility, and they contradicted each other flatly on the main material matters in issue; each is corroborated to some extent by some of the incidents connected with the transactions between them and by some of the circumstances in evidence; but most of the corroboration

is clearly on the side of the defendant in error. It was incumbent on the plaintiff in error to establish his claim by a preponderance of the evidence, and it is not so established, and consequently he was not entitled to a finding in his favor.

A question is also raised as to the sufficiency of the affidavit of merits, which the defendant in error filed with his pleas. The record does not disclose that the plaintiff in error made any objection to the sufficiency of the affidavit in the court below, and is therefore not in position to question its sufficiency for the first time here. It is evident too, that the pleas and the affidavit of merits were filed pursuant to the terms of the stipulation, which provides that there should be a trial on the merits; and must therefore be regarded as important only in the way of making up the issues on the merits which were to be tried. For the reasons stated the judgment is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, { ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT. Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

804

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October,
in the year of our Lord one thousand nine hundred and nine-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

CURT S. AYERS, Sheriff.

215 I.A. 655

BE IT REMEMBERED, that afterwards, to-wit: on

NOV 11 1919

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6687

Sarah Gill, Execr. &c. appellant.

215 I.A. 655

vs

Appeal from Stephenson.

Archibald Kosier, et al appellees.

Niehau, P. J.

On this case Jacob R. Gill filed a claim in the County Court of Stephenson County against the estate of Jacob Kosier, Sr. who died December 28, 1911. The claim was contested, and there was a trial by jury and a verdict in favor of the claimant, fixing the amount due him at \$2,155.22 and thereupon it was allowed. An appeal was taken to the circuit court. Afterward the death of the claimant, Jacob R. Gill, was suggested, and the appellant Sarah Gill as executrix of his estate, was substituted for the claimant. There was a trial by jury in the circuit court, and a verdict for the claimant for the full amount; but the circuit court set aside the verdict, and granted a new trial. The case was thereafter again tried; upon this trial the jury found in favor of the appellant, in allowing the claim, but fixed the amount due at \$68.85; and the court rendered judgment allowing that amount against the estate. From this judgment an appeal is prosecuted. There is evidence tending to show, that Jacob R. Gill, worked for the deceased at farm work during a period of eight and a half years, commencing with the year 1876. and ending in the year 1884; and that the deceased had agreed to pay Gill at the rate of \$1.00 a day for the work done during that period, and that he worked for the deceased at other times. Concerning the other charges for other work and other items embraced in the claim, one appears to be for work stacking grain in the harvest season in the year 1885; another for work done in harvest season in 1888; another charge is for pasturing 13 head of horses four months in the year 1893; the next charge

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is for labor furnished in keeping house for the deceased in 1894; and another for labor in keeping house in the year 1897; and another for keeping house in the year 1898; and another for keeping house in the year 1899; then there is a charge for labor performed in the year 1903; and another for cutting wood in 1905 and a charge for a ton of coal delivered in 1907; and another for camphorated oil for the deceased in 1910; and another for turpentine for the deceased in 1910; another charge is for taking care of deceased two months in 1910; another charge is for services of a man and team two days in 1910; and another charge is for cutting wood January 7th. to January 13th. in 1911; the total of these charges amount to the sum of \$2530.85. Then the claimant reduced his claim by giving the deceased certain credits as follows: For a girl's hat in 1894, \$1.00; ten yards of calico in the year 1896, 60 cents; ten yards of calico in the year 1898, 22 cents; one yard of ribbon in 1898, 15 cents; one bob sled March 16th. 1910, \$10.00; one graphophone March 20th. 1910, \$10.00; and bedding July, 1910, \$3.00 making a total of \$25.63. Deducting these credits left a balance claimed to be due of \$2495.22. There is no evidence however that these credits were payments made by the deceased on the claim.

The principal error insisted upon, is the ruling of the court in striking out, and excluding from consideration of the jury all the evidence relating to indebtedness accruing prior to five years before the death of the deceased, as barred by the statute of limitations. And it is contended by the appellant, that the indebtedness involved was not barred by the statute because it was revived by new promises to pay made by the deceased. But the record does not disclose any new promise made by the deceased to the claimant within five years period; there is evidence however to the effect, that the deceased told some of the

daughters of the claimant, that he owed their father money, and that he was going to pay the same. And the son of the claimant Harold Gill, testified, that in the spring of 1910 or 1911, he asked his grand father, the deceased, if he could have a log for reaches, and told him he would pay him for it, and that the grandfather responded by saying, "you dont have to pay me and you tell your father I owe him a lot of money, and I am going to pay him;" he further testified that shortly before his grand father's death in November 1911, when the grand father was sick in bed, and he was there to take care of him, and to do chores, that on one occasion he woke him up and gave him his medicine, the grand father said, "well I can depend on you just like I could on your father, and I owe your father a good deal of money, and if I live, I am going to pay him." Inasmuch as the deceased did actually owe the claimant money, which in the estimation of the deceased may have been considered a large amount, the legitimate inference would be, that this is the money the deceased referred to, and not a debt which he did not legally owe; and which had been outlawed many years before that time. But it is also apparent that these statements, which the deceased made were not promises made to the claimant, and therefore, could not have the legal effect of reviving debts claimed to be due him, but which had been barred by the statute.

Collar v Patterson, 137 Ill. 403; C. H. Alberta Com. Co. v Sessell 87 Ill.App. 378.

For the reasons stated, it is evident, that the ruling of the court excluding the evidence in question was not erroneous.

Another contention of appellant concerns the refusal of the court to admit evidence concerning a certain book in which it was insisted the claimant kept an account of the items and charges against the deceased. In this connection the appellant offered to prove, that the claimant kept a book of account showing itemized

statements of the services rendered by him to Jacob Kosier from March 1st. 1876 to 1910, in which was entered from day to day the services, the items of work performed and the price and in which was entered all items of credits and showing a balance then due from Jacob Kosier to Jacob Gill of \$2000.00; and that the same were true and correct books of account, and that the entries were made at the time the work was performed, and that the same was destroyed in a fire at the home of Jacob Gill about the year 1910; and that all of the entries in said book were made by the appellants at the direction of the said Jacob Gill, and were in her hand writing and that no other persons knew of the contents or knew of the existence of the contents of said book, or that the same were kept in this way; and that there are no other book or books of account kept by Jacob Gill; and offered the appellant as a witness for the purpose of proving, the existence of said book of account, and that the same was true and just, as above stated; and that the said book of account was destroyed by the personal knowledge of the appellant; and for the purpose of proving the entries as they appeared in said book of account; and to prove that there was no other witness or witnesses who had knowledge of these facts, or the existence of this book. While a party to a suit is competent to testify to his books of account, even though the opposite party may sue or defend as an executor or heir of a deceased person, (Miller v Pratz, 179 Ill. App. 304.) the appellant was not a competent witness concerning some of the matters contained in the ones offered; the offer having been made as a whole the objection was for that reason alone properly sustained. But it is evident that the proof offered, if it had been made, would not have shown the legal requirements necessary to constitute the book in question a book of account for the purposes of evidence. Section 3 Chapter 51 Revised Statutes (1917). Hence the proof would have been of no avail in the purpose for which it was offered. We find no error in the record and the judgment is affirmed.

STATE OF ILLINOIS, {
SECOND DISTRICT. { ss.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

Clerk of the Appellate Court.

805

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October,
in the year of our Lord one thousand nine hundred and nine-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

CURT S. AYERS, Sheriff.

215 I.A. 655

BE IT REMEMBERED, that afterwards, to-wit: on

1919 the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6741

Wayne Burnell, appellee.

215 I.A. 655

vs

Appeal from Marshall.

John Schroeder, appellant.

Niehau, P. J.

In this case the appellee Wayne Burnell sued the appellant John Schroeder in the circuit court of Marshall county to recover damages, which he claimed to have sustained in consequence of a collision, brought about by the alleged negligence of the appellant, in running his automobile into appellee's horse and surrey on the road leading from Lacon to Wilbur. There was a trial by jury which resulted in a verdict for \$131.00, upon which the court rendered judgment; and this appeal is prosecuted from the judgment.

A number of errors are assigned; but two only are argued. The principal contention of the appellant for a reversal of the judgment is, that the evidence concerning the alleged damages is insufficient. The testimony of the appellee, who was a competent witness for that purpose, is to the effect that his surrey was damaged, one shaft having been broken, hind axle bent on each side of the middle, wood split off the axle and spindles bent; also a wheel shoved in, and wood on the front springs broken; also the pole in the reach; and that the surrey was twisted all out of shape in various ways; that the value of the surrey prior to the collision was \$50.00; which was the amount he paid for it; and that it did not have a value to exceed \$5.00 afterwards; that the cost of the repair of different parts of the harness, which was broken by the collision was about \$11.00. Also that the mare he was driving was injured; that after the collision she would kick, and try to whirl around while going down hill; that noises would scare her, and a car coming up behind would scare her; and

2151A.655

Oct. 10, 1924

Wm. E. Burdell, Esq.

100 West 10th Street

John F. Burdell, Esq.

Chicago, Ill.

In this case the parties have submitted the

question of John F. Burdell's claim to the

county to a court of law, which is subject to the

in consequence of a collision, which is subject to the

regulation of the law, and which is subject to the

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that she continued to act that way after the collision; and that by reason thereof, the fair cash market value of the mare was reduced from \$200.00 to \$75.00. The jury evidently believed the testimony of the appellee concerning the injury, and the damages resulting therefrom; and this was a matter within the province of the jury. There is nothing in the record from which the court would be warranted in reaching the conclusion that the jury were not justified in finding as they did. And the verdict also having the approval of the trial judge, this court would not be warranted in holding that the verdict should be set aside on that ground.

The only question argued by appellant concerns the competency of appellee's children Olga and Agness Burnell, to testify as witnesses; Olga was twelve years old, and Agnes was nine years old at the time of the trial. The point is made, that these witnesses were not of sufficient age, and did not understand the nature and sanctity of an oath. And it is true that one of the witnesses while examined by the court did say that she did not understand what it meant, to take an oath. The trial court however, after he had instructed these witnesses as to the meaning of their being sworn, and concerning the obligations which rested upon them and the consequences resulting from testifying to something which was untrue, was satisfied that the children were competent witnesses. The question of the competency of witnesses is primarily a question for the trial court, and the trial court's determination after inquiry as to the competency of a child witness should not be set aside unless manifestly incorrect. *People v Lewis* 252 Ill. 381; *Shannon v Swanson* 208 Ill. 52; *Ross v Estate of Ross*, 204 Ill. App. 637.

We are of opinion that under the circumstances here presented

that the court should not be bound by the testimony of the witness, but that by reason thereof, the trial court should view the evidence as it is presented to the jury. The jury is the trier of fact, and it is its duty to weigh the testimony of the witnesses, and to determine the truth of the matter in dispute. The court should not interfere with the jury's verdict, unless it is manifestly wrong. In this case, the jury's verdict is not manifestly wrong, and the court should affirm it.

The only question of law presented by this case is the competency of the witness. The witness is a child, and the question is whether a child is competent to testify. The court has held in many cases that a child is competent to testify if he or she is of sufficient age and intelligence to understand the nature and consequences of testifying. In this case, the witness is a child of about 10 years of age, and the court finds that he is of sufficient age and intelligence to testify. The court should therefore admit his testimony.

We are of opinion that under the circumstances here presented

there was no error in allowing these children to testify; especially since the testimony which they gave did not concern nor have any effect, on the controverted questions of fact in the case. The record does not disclose any reversible error, and the judgment is therefore affirmed.

Judgment affirmed.

There was no error in the finding that the defendant was guilty of the crime charged. The evidence was sufficient to establish the guilt of the defendant beyond a reasonable doubt. The jury's verdict is affirmed. The judgment is affirmed.

STATE OF ILLINOIS, {
SECOND DISTRICT. { ss.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

Clerk of the Appellate Court.

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562
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October,
in the year of our Lord one thousand nine hundred and nine-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

CURT S. AYERS, Sheriff.

215 I.A. 655

BE IT REMEMBERED, that afterwards, to-wit: on

DEC 1 1919 the opinion of the Court was filed in

the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6675.

The People &c. Deft. in error.

215 I.A. 655

vs

Error to Co. Ct. Henderson.

Shelby Vaughn, Pltf. in error.

Dibell, J.

Shelby Vaughn was prosecuted, convicted and fined in the County Court of Henderson County for an assault with a deadly weapon on Edgar G. Lewis with intent to inflict a bodily injury, where no considerable provocation appeared. He prosecutes this writ of error to review said judgment.

The information on which he was arrested and tried was verified by the States Attorney upon information and belief only. Vaughn argues that this was a violation of his constitutional rights, under People v Clark, 280 Ill. 160, and People v Honaker 281 Ill. 295. He preserved this question by proper motions in the court below, which the court denied. But by bringing the cause to the appellate court he has waived the defect, if any. People v Powers, 283 Ill. 438; People v Reed, 287 Ill. 606. We disregarded this rule in People v Berger, 310 Ill. App. 532, decided by us at about the same time that the supreme court decided the Powers case, supra, but the present point that coming to the appellate court waived the error, was not there raised.

The evidence introduced by the People tended to show that on November 25, 1918, the defendant was driving a team along a street in the village of Media in Henderson County and hauling a load of hogs; that Lewis was chairman in war work; that he went up to Vaughn's wagon and spoke to Vaughn and told him that all those in that town who refused to do their part in a drive then on for the war service league were to have their names published, and Lewis solicited a contribution from Vaughn

2151A.655

Gen. No. 8875.

The Pec is &c. Deft. in error.

Editor to Co. of. Underwood.

Shelby Vaughn, Deft. in error.

Direct, O.

Shelby Vaughn was convicted, convicted and fined

the County Court of Washington County for an assault with a

deadly weapon on Edgar D. Lewis with intent to kill a constable

injury, there no considerable provocation existed. (Exhibits)

this writ of error to review said judgment.

The information on which he was convicted was filed

verified by the State Attorney upon information and belief.

only. Vaughn argues that this was a violation of his constitutional

rights, under People v. Clark, 250 Ill. 192, and People v.

Hawker, 251 Ill. 181. He reserves this question of error for

those in the court below, which the court denied. (Exhibits)

bringing the cause to the appellate court he has waived the

defect, if any. People v. Lewis, 251 Ill. 183; People v. Lewis,

257 Ill. 193. We also stated that this was a People v. Lewis, 251

Ill. App. 253, decided by the court the same time that the

appellate court decided the Lewis case, and the present

point that coming to the appellate court alive and well

not there raised.

The evidence introduced in the People's case is that

on November 25, 1919, the defendant was driving a team along

a street in the village of Media in Washington County and

a load of hay; that Lewis was standing in front of the

went up to Vaughn's wagon and spoke to Vaughn and told him

that all those in that team who refused to go to the fair

drive then on for the war service League were to have their

names published, and Lewis solicited a contribution from Vaughn

for that work; that Vaughn became angry, got off from his wagon and tied his team and took his coat off and came at Lewis and called him a vile name and said "I will fix you;" that Lewis said: "Don't you strike me;" that Vaughn went back to his wagon and took a hammer out of a box and came back at Lewis the same way and again called him a vile name and said he would fix him; that Lewis threw up his hands and backed off and put up his hands to protect himself; that Vaughn waved his hands and the hammer in a threatening manner as if to strike Lewis, and did once touch him; that Lewis then put his hammer back in the box and put on his coat and drove away. The hammer handle was from 12 to 15 inches long, and the hammer part was steel, some four or five inches in length and an inch or an inch and one half wide at its widest part. This was a deadly weapon and a blow from it might have inflicted serious injury. Vaughn denied that he was mad and denied that he approached Lewis in a threatening manner and denied that he intended to strike him. He testified that Lewis frightened his horse and they loosened a cleat on the receptacle in which they were confined; that he took off his coat in order to handle a hog if one should get out; that he got the hammer to fasten the cleat; that when he had done that he put the hammer back in the box and put on his coat and got on the wagon and drove away. He testified that he told Lewis that he had as many Liberty Bonds as Lewis had, and that he would contribute to any solicitor except Lewis, and he testified to a disagreement between himself and Lewis about soliciting for war work. Lewis had much stronger corroboration that Vaughn. If the jury believed Lewis, Vaughn was guilty of an assault, which is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another. The intention is manifested by the circum-

for that work; that Vaughn knew, however, that his first mission
and that his team had been out of the
and called him "a little fellow" and "I'll fix you," that
Lewis said: "Don't you strike me;" that Vaughn went back
to his wagon and took a hammer out of a box and came back
at Lewis' shoulder and again called him a little fellow and said
he would fix him; that Lewis threw up his hands and turned out
and put up his hands to protect himself; that Vaughn walked
his hands and the hammer in a threatening manner as if to strike
Lewis, and then once touched him; that Lewis then put his hands
back in the box and put on his coat and drove away. The hammer
handle was from 12 to 14 inches long, and the hammer head was
steel, some four or five inches in length, and an inch or an
inch and one half wide at the widest part. This was a killing
weapon and a blow from it might have inflicted serious injury.
Vaughn denied that he was and that he did not intend to
Lewis in a threatening manner and that he did not intend to
strike him. He testified that Lewis' right hand was open and
they loosened a strap on the receptacle in which they were con-
tained; that he took out the coat in order to examine a hole in the
shoulder; that he put the hammer to Lewis' shoulder; that
when he had done that he put the hammer down in the box and put
on his coat and got on the wagon and drove away. He testified
that he told Lewis that he had a very rapidly drawn a knife
and that he would contribute to any doctor's bill, and
and he testified to a disagreement between himself and Lewis
about soliciting for car work. Lewis had some previous experience
creation that Vaughn. If the jury believed Lewis, Vaughn was
guilty of an assault, which is an unlawful touching, coupled
with a present ability, to commit a violent injury on the
person of another. The intention is manifested by the circum-

stances connected with the perpetration of the offence. The jury were warranted by the evidence in finding defendant guilty. The judgment is therefore affirmed.

The judgment is therefore affirmed.
 They were admitted by the evidence as being competent.
 evidence connected with the execution of the will. The

STATE OF ILLINOIS, {
SECOND DISTRICT. ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

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8372

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October,
in the year of our Lord one thousand nine hundred and nine-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

CURT S. AYERS, Sheriff.

215 I.A. 655

BE IT REMEMBERED, that afterwards, to-wit: on

DEC 1 1908 the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6732.

E. B. Doolittle et al appellants. **215 I.A. 655**

vs

Appeal from Lake.

M. A. Kepple, appellee

Dibell, J.

E. B. Doolittle and P. W. Newhouse are in the real estate business as Grays Lake Realty Company, at the village of Grays Lake in Lake County. M. A. Kepple owned a farm of 365 acres in that vicinity, capable of division into two farms. On July 31, 1917, he entered into a written contract with the Grays Lake Realty Company by which he gave them exclusive and irrevocable authority for twelve months to sell the same, and agreed to pay the company three per cent commission therefor. In November 1917, he contracted to sell the same to John McCurdy and H. H. Perry, and afterwards did sell and convey the same to said parties. Doolittle and Newhouse claimed that they were entitled to commissions for said sale. Kepple did not pay them, and they brought this suit against Kepple therefor and filed a declaration, the first count of which was upon the written contract, the second count on a contract to pay them so much as their services were reasonably worth for procuring a purchaser, and the third was the consolidated common counts. Defendant pleaded the general issue, there was a jury trial and a verdict and a judgment for defendant, from which plaintiffs appeal. Before the contract was prepared and signed, but on the same day, Doolittle and Kepple had a conversation on the question of employing plaintiffs to sell defendant's farm. Whether the interview was sought by Doolittle or by Kepple is immaterial. Doolittle told Kepple that his farm was large that most buyers were looking for a small farm, and that he would not wish to take hold of it and spend a lot of money on it unless he had an exclusive right to sell it for a definite

Gen. No. 3751.
F. T. Doolittle et al. vs. J. A. McQuay, Jr.

Answer to Complaint.

J. A. McQuay, Jr.

Plaintiff.

F. T. Doolittle et al. vs. J. A. McQuay, Jr.

Business as Usual. The plaintiff, J. A. McQuay, Jr.,

lives in Lake County, N. J. The defendant, F. T. Doolittle,

lives in the vicinity of the plaintiff's residence.

On or about the 1st day of January, 1917, the plaintiff

lives in the vicinity of the plaintiff's residence.

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On or about the 1st day of January, 1917, the plaintiff

time. They afterwards prepared and executed the contract described in the first count. It gave plaintiffs exclusive authority to sell said farm on the terms therein mentioned, and therein agreed that said contract could not be revoked for twelve months from that date, as completely as language could do so. Plaintiffs then advertised the farm for three Sundays in the Chicago Sunday Tribune and also ran advertisements of it in the local weekly paper in the village of Grays Lake. McCurdy had a farm which he wished to sell, and if he sold it he wished to buy a cheaper farm. Doolittle gave McCurdy a list of several farms plaintiffs had for sale, including the Kapple farm. McCurdy then went and saw the Kapple place and had a conversation with Kapple and then went to Doolittle again. Doolittle gave ~~xxx~~ ~~xxxx~~ McCurdy the price of \$125.00 per acre, which was the price named in the contract, and McCurdy said he had seen Kapple and believed he could buy it cheaper than that; that he had been and seen it the day before and would give \$125.00 per acre for the north 155 acres. Doolittle went to Kapple with this proposition. Kapple refused to divide the farm. Kapple then told Doolittle he would take \$120.00 per acre for the whole farm, and they figured this to amount to \$31,800. Kapple then said he would sell the whole farm for an even \$31,000 with \$10,000 cash and a mortgage for the balance at 5% interest per annum. Doolittle then sought out McCurdy and repeated this new proposition to him, to which McCurdy made no reply at that time. Afterwards he asked that Doolittle and Newhouse should go and see Kapple and get the interest cut to $4\frac{1}{2}\%$ and the price reduced to \$30,000 and if that reduction was made he would take it. Newhouse and Doolittle went to see Kapple thereafter and he then agreed to sell for \$30,000, \$10,000 down and the balance on time at $4\frac{1}{2}\%$. Late that evening Doolittle notified

McCurdy that his offer was accepted, and to bring over some money, and McCurdy said he would be there the next morning; that he and one Studer were going to take levels of the land and if they could get a proper fall for drainage, he, McCurdy would take the farm. The next day Doolittle saw Kapple and told him that he thought McCurdy would take the farm; that McCurdy had gone with a surveyor to take the levels; and Kapple said he had met them. Kapple did not go near plaintiffs again, but a few days later a contract between Kapple on the one hand and McCurdy and Perry was prepared by one Churchill, a lawyer, who sometimes sold real estate, and it was signed by Kapple, and Churchill signed the names of McCurdy and Perry to it as their agent. Afterwards Kapple deeded part of the farm to McCurdy and the rest to Perry. He sold for the price and the terms which plaintiffs had induced him to agree to, namely, \$30,000 of which \$10,000 was cash and the balance on time with interest at $4\frac{1}{2}\%$ per annum, secured by mortgages. Nearly everything above stated is undisputed. Plaintiffs also testified that at their last meeting with Kapple when the terms finally accepted were fixed, he asked what plaintiffs' commission would be and was told three per cent on \$30,000 or \$900. and that after being told that he announced to them that he would accept the offer. Kapple denies that anything was said about commissions at that meeting, but the apparent preponderance is against him.

Churchill had once had his farm listed with him for sale, but the time within which he could sell had expired. McCurdy did not wish to buy the whole farm but only the north 155 acres. He had a friend Perry with whom he had had many trades. He selected Perry to take the south 110 acres. In the course of the discussions as to whether Perry would go in with him they talked with Churchill. Churchill learned from them that Kapple had given a price of \$31,000 to plaintiffs. He then

McCurdy that his offer was accepted, and he was to pay the money, and McCurdy said he would be paid in 1890; that he and one Taylor were going to take the land and if they could get a good bill for the same, they would take the farm. The next day McCurdy called him and said he thought McCurdy would take the land; that McCurdy had gone with a surveyor to take the level; that McCurdy said he had met them. Kappie's letter to him was dated 1890, and a few days later a contract between Kappie and the McCurdys, who McCurdy and Perry was, signed by one Churchill, a lawyer, who sometimes sold real estate, and it was signed by Kappie, and Churchill signed the name of McCurdy and Perry + it was their agent. Afterwards he decided part of the farm to be sold and the rest to Perry. He sold for the price of the farm which plaintiff had offered him to agree to, namely, \$50,000 of which \$10,000 was cash and the balance on time with interest at 4 1/2% per annum, secured by mortgages. Plaintiff's above stated is undisputed. Plaintiff also testified that at their last meeting with Kappie when the terms of the mortgage were fixed, he asked what plaintiff's commission would be and was told three per cent on \$50,000 or \$1500. The day after being told that he amounted to them what he would receive the other Kappie denies that meeting was held about conditions of last meeting, but the evidence preponderates in favor of his testimony. Churchill had once and his farm divided with the McCurdys, but the time when which he could sell was expired. McCurdy did not wish to buy the whole farm but only the north 135 acres. He had a friend Perry with whom he had a very small farm. He selected Perry to take the south 110 acres. In the course of the discussion as to whether Perry would go in with him they talked with Churchill. Churchill learned from them that Kappie had given a price of \$31,000 to plaintiff. He then

went to Kapple and told him he ought to give him, Churchill an equal chance to sell the farm and Kapple apparently assented. Churchill rendered some assistance in enabling McCurdy and Perry to make their joint arrangements, which required McCurdy to raise the whole of the \$10,000 in cash. Churchill acted as agent for McCurdy and Perry in signing the contract for them, but before that time he was not able to get the terms which McCurdy and Perry would accept, and McCurdy went to plaintiffs and they were the ones who procured from Kapple and communicated to McCurdy the terms which were finally accepted. Kapple paid Churchill \$500 commission, and Churchill without the knowledge of McCurdy, paid one half of it to Perry. Churchill assisted McCurdy and Perry in determining how the expenses of the proposed drainage should be divided between McCurdy and Perry and perhaps assisted in inducing a neighbor who would be benefited by the drainage to agree to pay a part of that expense. The evidence appears to make a clear case that the plaintiffs performed their contract with Kapple and were entitled to receive from him the agreed commissions. It is true that there were a few things inserted in the contract with McCurdy and Perry which had not been discussed between plaintiffs and Kapple concerning the time of giving possession and certain personal property on the farm and concerning twelve dead trees which Kapple had previously sold, but those matters do not affect the right of plaintiffs to compensation. Kapple did not give plaintiffs an opportunity to render the final services in drawing the contract with the purchasers.

The plaintiffs called McCurdy in rebuttal and he stated that he had started to look at the farms, to which Doolittle had called his attention, before he saw Churchill. It was objected that this was not rebuttal, and the objection was sustained.

ent to Kapla and told him he ought to give him, O'Connell, an equal chance to sell the farm and Kapla's position was established. O'Connell finished his deposition in writing, which was given to Perry to read. Perry told Kapla that he was not going to raise the hole of \$10,000 in cash. O'Connell said a check for \$10,000 and Perry in writing, the check was for \$10,000, but before that time he was not able to get the money, which McCurdy and Perry said was \$10,000. O'Connell went to O'Connell's and they were given the money which was provided from Kapla's and communicated to McCurdy. The money was given to O'Connell. Kapla and O'Connell had a conversation, and O'Connell, without the knowledge of McCurdy, told O'Connell of it to Perry. O'Connell assisted McCurdy and Perry in determining how the expenses of the proposed message should be divided between McCurdy and Perry and certain expenses in writing a message who would be entitled to the message to send to the other of that expense. The evidence shows that Kapla and O'Connell that the plaintiff performed their contract with Kapla and were entitled to receive the money. It is true that there were a few things involved in the contract with McCurdy and Perry which had been divided between plaintiff and Kapla concerning the right of living possession and certain personal property on the farm and concerning the dead trees which Kapla had previously sold, but those things do not affect the right of plaintiff to compensation. Kapla did not give plaintiff an opportunity to make the final services in writing the contract with the purchase. The plaintiff called McCurdy in a letter and he told him that he had started to look at the farm, to which O'Connell had called his attention, before he saw O'Connell. It was agreed that this was not rebutted, and the objection was overruled.

We think the evidence was proper at that time, but the answer was not excluded and no harm was therefore done plaintiffs. The court gave an instruction at the request of defendant that the plaintiffs must prove their case and every issue thereof by the preponderance of the evidence, and also another instruction that there could be no recovery under the second and third counts of the declaration. The jury would be likely to understand from this that as plaintiffs could not recover under the second and third counts therefore they had not proved every issue and could not recover. , No doubt this was not what the court meant, but the jury might easily so understand it. The court should not have instructed that there could be no recovery under the third count.

There is much immaterial testimony in this record. If McCurdy and Perry consulted Churchill and got him to act as their agent, and he assisted them in making such arrangements between themselves that they could buy this property, and if Kapple assented to permit Churchill to act as his agent in the closing days of the deal, all these matters were immaterial in this case between plaintiffs and Kapple. If they performed their contract and procured a purchaser to whom Kapple conveyed the land on terms which they had arranged for him with the purchaser, his subsequent weakness in permitting another agent to draw the contract and the deed cannot defeat plaintiffs.

The judgment for defendant is for costs only, and is therefore not a final judgment, in a case of this kind, and is not ~~axxx~~ in bar. Town of Magnolia v Kays, 200 Ill. App. 133. If a motion to dismiss the appeal on that ground had been made it must have been granted.

The judgment is therefore reversed and the cause remanded for a new trial.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

62

81

(8052)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October,
in the year of our Lord one thousand nine hundred and nine-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

CURT S. AYERS, Sheriff.

215 I.A. 655

BE IT REMEMBERED, that afterwards, to-wit: on

DEC 1 1919

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:



Gen. No. 6753

Julia E. Laymon, appellee

215 I.A. 655

vs

Appeal from Livingston.

The estate of Henry Francis, deceased.

appellant.

Dibell, J.

On August 5, 1915 Henry Francis died intestate at his home in Odell in Livingston County. His wife had died many years before. Julia E. Laymon, a daughter, served as his housekeeper and nurse for about twenty one years and till his death. She filed a claim against her father's estate for such services. On a jury trial in the County Court a verdict was directed for the Estate. Claimant appealed to the Circuit Court where she had a verdict and a judgment for \$3,338.00. We reversed that judgment in Laymon v The Estate of Henry Francis, deceased, 213 Ill. App. 82. The cause has been tried again and claimant has had a verdict and a judgment for \$3,750.00 from which the estate prosecutes this appeal.

The legal principles applicable to the case are ~~sitz~~ stated and authorities cited in our former opinion, to which we here refer without repeating them. At the last trial instructions were given at the request of each party, which implied that the services were rendered under the family relation. It was therefore necessary that such facts and circumstances should be shown as to justify the inferences that at the time the services were rendered claimant expected to receive payment and her father expected to make payment. Claimant had a new witness on this subject at the last trial who was out of Illinois at the time of the former trial. She had always known Francis and in 1913 had a long conversation with him in his home in which she talked about trouble which her grandmother had had with her daughter, and Francis after commenting on that and

saying that his daughter was always good to him, said: "When Julia came here I promised to pay her and I shall see that she is well paid." This evidence was not directly contradicted and if believed, warranted the jury in finding that this promise was made by the father to claimant at the time when she came to his home to be his housekeeper and nurse, and that that relation was entered into upon an express promise by the father to pay claimant what her services were worth, and that she relied upon that promise. Other circumstances attending this case are briefly as follows: The wife of Francis had died many years before and he had a daughter, Emeline, who had been his housekeeper till about December, 1894 when she was stricken with an incurable malady and could no longer serve as housekeeper and it was necessary for Francis to get some other housekeeper. There was a difference of opinion in the family as to whom he should get, but he decided that he wanted his daughter, Mrs. Laymon. She was a widow. Her husband had died in 1884 leaving her without any considerable property and with seven children. After a little time her father had her move into a house on one of his farms. It is the contention of the estate that he supported her during those ten years on his farm and that when he moved her to his home in 1894 he continued to support her and her family, and that it was really only transferring her place of living and support from the farm to his home in Odell. This has some evidence to support it. He did tell a grocer to sell Mrs. Laymon groceries and charge them to his account and he would pay for them. He did send various things to her house. The preponderance of the evidence indicates that these occurrences were during the first years of her widowhood. She was able to show receipts for large sums paid by her for groceries. Her two boys went out to work and

saying that his daughter was always good and obedient. "When
 Julia came here I promised to pay her \$100. I could not pay her
 it is well said." This evidence was not admitted into evidence
 and it is believed, warranted the jury in finding that the relation
 was made by the father to the daughter at the time when she came to
 his home to be his housekeeper and nurse, and that that relation
 was entered into upon an express promise by the father to pay
 a certain sum of money for her services, and that the promise
 upon that promise. Other evidence was admitted in the case
 are briefly as follows: The wife of Francis A. Layton, who
 years before and his daughter, Francis, who had been his
 housekeeper till about December, 1904 when she was discharged
 with an incurable salary and could no longer serve as house-
 keeper and it was necessary for her to get some other
 housekeeper. There was a difference of opinion in the family as
 to whom she should get, but he decided that he wanted his daughter,
 Mrs. Layton. She was a widow. Her husband died in 1894
 leaving her without any considerable property but with seven
 children. After a little time her father had her move into
 a house on one of his farms. It is the contention of the
 estate that he supported her during those two years on his
 farm and that when he moved her to his home in 1904 he continued
 to support her and her family, and that it was really only
 transferring her place of living and support from the farm to
 his home in Oshkosh. This has some evidence to support it.
 and tell a grocer to deliver. Layton received and a letter from
 to his account and he would pay for them. He did not pay one
 thing to her house. The preponderance of the evidence indi-
 cates that these occurrences were during the first years of
 her widowhood. She was able to show receipts for large sums
 paid by her for groceries. Her two boys went out to work and

brought all or most of their wages home to her. Mrs. Laymon herself went out to work to earn money. She sometimes went to her father's home and did work for him. Before she went to be housekeeper in his home her two oldest daughters had married and had homes of their own. When she went to begin this house-keeping she only took with her three little girls. In a very few years the oldest of these went to work in a store and elsewhere and either earned all her own living or at least enough to pay for her clothing. In due time these girls married and went to homes of their own. This was not a family wholly independent upon Francis when he brought Mrs. Laymon to his home to keep house for him. There is some evidence tending to indicate he afterwards paid for her clothing, but the preponderance of the evidence is that he did not buy her clothing, but that what she was not able to buy with her own means, she was assisted in buying by a married daughter and possibly by her sons.

Francis was over seventy years old when Mrs. Laymon came to be his housekeeper and nurse and was about ninety two years of age when he died. The proof for claimant tended to show that for at least ten years before he died he was feeble and a very great care; that he had asthma, heart trouble, bowel troubles, and a stomach trouble which caused him to vomit at the table. The evidence for the estate tended to show that he was well and up and around, mowing his own lawn and taking care of his own horse, and doing work of that kind, till within one week of his death. This left a question for the jury to determine as to the value of the services which Mrs. Laymon necessarily rendered to him, and we see nothing in the evidence to justify us in setting aside their conclusion on that subject.

It is contended that the statute of limitations was a partial defense. There is evidence that quite a number of years before he died Francis delivered to his daughter a note for

\$300.00 collected the interest himself, and required the maker of the note to pay the principal to Mrs. Laymon, which he did. There is no evidence of any other indebtedness, except for her services as housekeeper and nurse, for which he should be paying her, and, in view of what he told the witness first above referred to and the law as stated by us in our former opinion, we conclude that the jury were warranted in treating this as a payment upon this indebtedness. Again there is evidence clearly tending to show that Francis had decided that his method of paying his daughter should be to give her his home in Odell in addition to giving her an equal share with the other children in the rest of his estate. We think it may fairly be inferred from all the evidence that Mrs. Laymon expected that the home was to be given to her for her services. This, obviously, was not to be done till the father died, and therefore the statute of limitations should not begin to run against this claim till his death.

There was proof by the estate of statements made by Mrs. Laymon at about the time of her father's death or soon thereafter, which seem to indicate that she had no arrangement with him for compensation. She denied those statements which could be so construed, and her other statements could be understood to mean that she expected a provision to be made for her and that she feared he had not made it and was not aware that she could enforce payment from his estate after his death if he had not made the provision she expected. Upon most of the subjects mentioned in this opinion there was a contrariety of evidence. It was the province of the jury to settle those questions, and we are of opinion that substantial justice has been done.

The judgment is therefore affirmed.

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... not to say ...
... no evidence of any other ...
... however ...
... in view of ...
... and the ...
... we conclude ...
... on this ...
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... his daughter ...
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his death.
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... that ...
... could ...
... not ...
... mentioned ...
... it was ...
... we are ...
The judgment is therefore affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

6 15

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October,
in the year of our Lord one thousand nine hundred and nine-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

CURT S. AYERS, Sheriff.

215 I.A. 656

BE IT REMEMBERED, that afterwards, to-wit: on

DEC 1 1919 the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6765

City of Rockford, appellant.

215 I.A. 656

vs

Appeal from Winnebago.

John T. LaForge & Sons, Inc.

appellee

Dibell, J.

After appeal from a police magistrate to the circuit court of Winnebago county and a change of defendants there, John T. LaForge & Sons, Inc., was tried without a jury for a violation of an ordinance of the city of Rockford and was acquitted and the city appeals from that judgment.

Defendant had for ten years been engaged in buying garbage and table waste from hotels and restaurants in the business part of the city, for which it paid a substantial consideration. The object was to get the grease contained therein which was valuable in making soap, but the kitchen help would not separate the grease from other refuse and therefore defendant bought it all and removed it to a plant where the grease was extracted and the remaining refuse made into fertilizer. Defendant removed this garbage and table refuse from the hotels and restaurants of its customers every day during hot weather and every day except Sunday in cold weather. It was not shown that defendant was guilty of any misconduct or lack of care in removing this waste, but only that it violated an ordinance. In 1917, long after defendant's business had been established, the city adopted an ordinance, section 6 of which was as follows:

"Sec. 6. No person, firm or corporation shall collect any garbage in the city of Rockford, or haul the same over or upon any of the streets, avenues or alleys of said city, except the person, firm or corporation with whom the city of Rockford contracts for the collection and disposal of the same, and those in his or their employ, and then only in strict accordance with the provisions of this ordinance."

Exhibit A, 656

Gen. No. 3785

City of Richmond, Virginia.

Appears from documents.

vs.

John T. Latorre & Sons, Inc.

Complainant

Defendant, J.

After removal from a public garbage dump in the city of

South of Virginia County and removal to defendant's dump, John

T. Latorre & Sons, Inc., was notified by the City of Richmond

of an ordinance of the City of Richmond which prohibited

the city from receiving such garbage.

Defendant had not been given notice of such ordinance

garbage and table waste from hotels and restaurants in

defendant's city. The ordinance was not published

in the city. The object of the ordinance was to prevent

which was valuable in making money, but the defendant is

not responsible for the removal of such waste from the

and brought it all and removed it to a dump outside the city

was extracted and a remaining waste from the dump.

Defendant removed the garbage from the dump and

and removal of the garbage from the dump and

and every day except Sunday in each week. It is not

that defendant was guilty of any violation of law or

in removing this waste, but only that it violated an ordinance.

In 1917, John T. Latorre & Sons, Inc. was notified

the city adopted an ordinance, Section 5 of which was as follows:

"Sec. 5. No person, firm or corporation shall collect any

garbage in the city of Richmond, or haul the same over the

any of the streets, avenues or alleys of said city, except

person, firm or corporation with whom the city of Richmond

contracts for the collection and disposal of the same, and

those in his or their employ, and then only in strict accordance

Under this ordinance the city in February, 1919, entered into a contract with E. C. Dupree, by which the city gave Dupree the right to collect and cart away all garbage in the city of Rockford from April 1, 1919 to December 1, 1919, for which the city agreed to pay him \$11,200. It is claimed this gave Dupree the exclusive right to collect garbage and that it was a violation of said ordinance to collect garbage in said city during that period, as the proof showed it had done.

The powers of city councils are granted by Section 1 of Article 5 of the Cities and Villages Act. The city relies upon Paragraphs 75, 78 and 98 of said section. 75 gives cities the power to declare what shall be a nuisance and to abate the same; 78, to do all acts and make all regulations necessary or expedient for the protection of health or the suppression of disease; and 98, to pass all ordinances and rules and make all regulations proper or necessary to carry into effect the powers granted to cities. The city cites many authorities outside of Illinois to show that this ordinance is within the police power of cities and is not invalid because it authorizes the creation of a monopoly. It is unnecessary to examine those authorities because the question here presented we consider settled by *Landburg v City of Chicago*, 237 Ill. 112. There Landberg had been in the business for several years of collecting and removing manure from the city of Chicago and he had contracts with numerous persons which required him to remove such manure daily. While he was in that business the city passed an ordinance authorizing the commissioner of health to advertise for bids and make contracts giving the exclusive privilege of removing manure to the persons to whom the commissioner should award such contract, and it made it unlawful for any other party to engage in that business, and therefore was calculated to destroy Landburg's business. It was there held that this ordinance

Under this ordinance no city in Kentucky, 1911, unless it

contract with D. C. White, by which it was

the right to collect and carry all garbage in the city and

Proctor from April 1, 1912 to December 1, 1913, for which the

city agreed to pay him \$11,300. It is claimed that the

the exclusive right to collect garbage in that city

violation of said ordinance to collect garbage in said city

during that period, as the record shows it had done.

The powers of city councils are granted by Section 1

of Article 5 of the Constitution and the city council

when Paragraph 73, Section 5 of said section. The city council

the power to declare what shall be a nuisance and to enact the

same; 75, to do all laws and make all regulations necessary

or expedient for the protection of health or the suppression of

liceas; and 56, to pass all ordinances and rules and make all

regulations proper or necessary to carry into effect the powers

granted to cities. The city council may also be authorized

Illinois to show that this ordinance is within the police power

of cities and is not in violation of the Constitution and the

of a monopoly. It is unnecessary to examine these authorities

because the question here presented is not one of the right of

Landberg v. City of Chicago, 107 Ill. 111. There is no

claim in the business for several years of collecting and

moving refuse from the city of Chicago and the city council

with numerous persons who requested him to remove such refuse

daily. While he was in that business the city council on

finance authorizing the commissioner of health to contract with

him and the contract giving him exclusive privilege of

moving refuse to the persons to whom the commissioner should

award such contract, and it was held that this ordinance

to engage in that business, and therefore was subject to

destroy Landberg's business. It was there held that this ordinance

was an attempted unreasonable exercise of the general powers given the city to which we have referred, because it would have the effect of destroying Landberg's legitimate business. It would serve no useful purpose to paraphrase the language of that decision so as to make it apply to the removal of garbage. We see no difference in principle between that case and this.

The judgment is therefore affirmed.

was an attempt to establish a principle of the right of
given the duty to which we are bound, we must be bound
have the effect of establishing a right of the individual
It would serve no useful purpose to say that
of that isolation so as to make it a duty to the removal of
change. We see no difference in principle between that duty
and this.
The purpose of this is to establish a principle.

STATE OF ILLINOIS, { ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT. Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

810 L
Chancery filed July 9-1919
R A denied Oct 1-1919
GEN NO. 7010 APRIL TERM, A. D. 1919. AG. NO. 51.

Leo W. Bredehoft and Albert Ball, co-partners as Bredehoft & Ball, Defendants in Error.

vs

Walter L. Ross, as Receiver of the Toledo, S. Louis & Western Railroad Co. Plaintiff in Error.

215 I.A. 656

Error to the Circuit Court of Vermilion County

OPINION BY WAGGONER, J.

The defendants in error, Bredehoft & Ball, bought an action, before a justice of the peace, against plaintiff in error, Walter L. Ross, as Receiver of the Toledo St. Louis & Western Railroad Company, to recover damages sustained by reason of potatoes freezing that were shipped in a car over the plaintiff in error's railroad. The case was appealed to the circuit court, and on a trial in that court, judgment was rendered against plaintiff in error for \$108.00.

Bredehoft & Ball are engaged in the wholesale commission business at Danville, Illinois, and bought a car load of potatoes from Henry Werner of Bloomer, Wisconsin. The car was shipped from Bloomer, November 10, 1914, by way of Chicago, consigned to Bredehoft & Ball, Danville, Illinois. Before the car reached Chicago they

Page 1

reconsigned it to themselves at Metcalf, Illinois, a station of the Toledo, St. Louis & Western Railroad Company, by way of Cayuaga, Indiana. The car arrived at Metcalf, November 16, 1914. At that time the weather was mild and the temperature above freezing. On November 18, the temperature dropped to about ten degrees above zero, and it is not disputed that the damage done to the potatoes, thereby, was \$108.00.

The railroad company claims that this was a shipment from Bloomer, Wisconsin, to Metcalf, Illinois, and therefore an interstate shipment, and the rights of the parties governed by the federal laws. Defendants in error contend that it should be considered as a shipment from Danville, Illinois, to Metcalf, Illinois, and that the law of Illinois applies. Even if it be considered as a shipment from Danville, Illinois, to Metcalf, Illinois, it was made by way of Cayuaga, Indiana, and that would make it an interstate shipment. Hanley v. Kansas City

al charge made of five cents per hundred pounds.

There was a dispute, in the evidence, as to whether or not the bill of lading contained an endorsement "Shipper protects car from frost." The station agent, F. C. Anderson, at Bloomer, Wisconsin, and H. M. Steely, of Danville, each testified that until after the trial of the case before the justice of the peace such endorsement appeared on the bill of lading and a duplicate copy was produced showing such endorsement on it. The railroad company claims that the original bill of lading has since been altered by erasing the endorsement. On the other hand, George Bredehoft and Leo Bredehoft each testified that no such endorsement appeared on the original bill of lading. The railroad company claims that even if the endorsement, "Shipper protects car from frost" was not on the original bill of lading, still the railroad company was not obliged, under it, to furnish protection from frost for the reason that Bredehoft & Ball availed themselves of the lower rate of freight. Defendants in error in their brief, filed in this court, say, "We are inclined to

Page 4

agree with counsel for plaintiff in error that the presence or absence of those words on the bill of lading is immaterial." Hence, it is confessed, by the defendants in error, that so far as the bill of lading is concerned, protection from frost thereunder was to be furnished by them.

Defendants in error base their claim, in this case, upon a charge of negligence, on the part of the railroad company, in not notifying them of the arrival of the car of potatoes on November 16. Defendants in error contend that if prompt notice had been given them of the arrival of the car of potatoes on November 16, they could have prevented the damage that was caused by the change in weather two days later. The station agent, of the railroad company, mailed a postal card notice of the arrival of the car to Bredehoft & Ball on November 16, addressed to them at Metcalf, Illinois. That place is a village of about seven hundred inhabitants, and the agent well knew that they did not live in Metcalf, and that they shipped merchandise, every week, from Danville to Metcalf.

The railroad claims that even if required to notify defendants in error of the arrival of the car, and did

not do so, and was negligent in that respect, still it is not liable, for the reason that defendants in error undertook to furnish protection from frost and assumed the risk of any damage that might result from a failure

Page 5

so to do.

Where a carrier is guilty of negligent delay in transporting or delivering goods, and the goods are thereafter damaged by an excepted cause, and but for such delay the goods would not have been exposed to the casualty, the carrier is liable. *Michigan Central Railroad Co., v. Curtis*, 80 Ill. 324. It is the same rule as is applied when by the negligent delay of the carrier the goods are destroyed by an act of God. In such case the carrier is held liable, although he would not be liable but for its negligence which caused the goods to be exposed to the casualty. *Wald v. Pittsburg Railroad Co.*, 162 Ill. 545; *Sandy v. Lake Street Elevated Railroad Co.*, 235 Ill. 194.

Plaintiff in error claims that notice to the traveling salesman of the defendants in error, was sufficient notice of the arrival of the car of potatoes. There is no evidence, in the record, as to the authority of such salesman. To make notice to the agent sufficient, the railroad company had the burden of proving that he was an agent with authority to receive the notice and thus bind his principal. *Chicago, Burlington & Quincy Railroad Co. v. Hammond*, 210 Ill. 187 (194).

The judgment rendered in this case should be and is affirmed.

Judgment affirmed.

Page 6

certiorari
allowed

Opinion filed July 9-1919
Amended
re filed Oct 15-1919

GEN. NO. 7025 APRIL TERM, A. D. 1919 AG. NO. 26

Martha M. Logan, Appellee

vs.

215 I.A. 656

The Mutual Life Insurance Company of New York

Appellant

Appeal from Circuit Court of Moutrie County.

OPINION BY WAGGONER, J.

The appellee, Martha M. Logan as beneficiary, brought an action in assumpsit against the Mutual Life Insurance Company of New York on a policy of insurance, issued by said company, on the life of her husband, William H. Logan, and filed a copy of such policy in addition to setting it out in haec verba in the first count of the declaration. To such declaration there was filed a plea of general issue and three special pleas. A demurrer was sustained to each of such special pleas, and a trial had before a jury. A verdict was rendered in favor of appellee for \$10,855.54, being the amount of the policy, with interest thereon, and upon the verdict judgment was rendered against appellant.

Appellant defended this action on the ground that the policy in question had not been delivered by it to the insured, and all errors alleged revolve around this contention. Section 52,

Page 1

Chapter 110, Hurd's Statute 1917, provides that no person shall be permitted to deny, on trial, the execution of any instrument in writing, upon which an action may have been brought, when a copy is filed, unless the person so denying the same shall, if defendant, verify his plea by affidavit. In this case neither of appellant's pleas were so verified.

In the case of The Northwestern Mutual Life Insurance Co. v. Richardson, 130 Ill. App. 205, where the insurance company interposed the defense that the policy sued on had not been delivered, this court said, "the plea of the general issue, verified, sought to be interposed by appellant in this case was indispensable to its legal defense." In Woltzen v. Weiman, 168 Ill. App. 220 (223), referring to said section 52, it is said that, "this section was a re-enactment of a former statute, and the execut-



ion' therein referred to has been held to include delivery." In Johnston v Loar, 145 Ill App 443 (445), where a verified plea was interposed, it was said by this court that, "it imposed upon the plaintiff the burden of proving the execution of the notes and the endorsement, assignments and respective deliveries of the notes as averred in the declaration." A note cannot be said to be executed until it is delivered. (Hunt v. Weir, 29 Ill. 83 (85). To require proof of the execution of an instrument is to require proof of authority to execute it, and if the

Page 2

execution is denied by a verified plea, the authority of the agent to execute such instrument constitutes an essential part of the plaintiff's proof. City of Chicago v. Peck, 196 Ill. 260 (262); Walsh v. Marvel, 130 Ill. App. 305 (308).

Attorneys for appellant contend that the objection, that the plea was not verified by affidavit, was not interposed to the evidence offered by appellant of non-delivery of the policy, and that such objection was thereby waived. As we understand said section 52, and the cases construing it, appellant waived proof of the execution of the policy, and could not be permitted on the trial to deny its execution on account of having failed to verify its plea by affidavit as required by the provisions of such section. In the case of Stevenson v. Farnsworth, 7 Ill. 715 (717-718), it is said that "under this provision, the genuineness of the instrument sued on is admitted, unless its execution is denied on oath by the person charged to be the maker. If his plea be not verified by affidavit, he is precluded on the trial from controverting the execution of the instrument. The pleas of non est factum and non-assumpsit may, however, be pleaded as formerly. The statute does not change the mode of pleading, but the rule of evidence only. Under these pleas the defendant may still insist on any legal defense that he could

Page 3

~~have done at common law, except merely denying or disproving the execution of the instrument declared on." The same rule is announced in the cases of Bailey v. Valley National Bank, 127 Ill. 332; Halbig v. Citizens Insurance Co. 231 Ill. 251; Zuel v.~~

have done at common law, merely denying or disproving the execution of the instrument declared on.

It was urged on the argument, that the plaintiffs, by not objecting to the issue in the court below, treated the pleas as properly verified, and that if the objection had been there made, the defendants could have obviated it, by severally swearing to the truth of the pleas. This is a mistaken view of the law. As before stated, the statute has not altered the mode of pleading, but merely changed a rule of evidence.

The plaintiffs were bound to join in the issues tendered. The verification of the pleas was the business of the defendants, with which the plaintiffs had nothing to do. It is not like a plea in abatement, which, if not accompanied with an affidavit, the plaintiff may accept or reject at his option. Here they had no right to object. The Pleas were valid, whether verified or not". The same rule is announced in the cases of Bailey v. Valley National Bank, 127 Ill. 332 (339); Helbig v. Citizens Insurance Company, 234 Ill. 251 (257); Zuel v. Bowen, 78 Ill. 234; and Firemans Insurance Company, v. Barnsch, 161 Ill. 629.

By reason of the provisions of the statute, above referred to, appellant was not entitled to offer evidence of a non-delivery of the policy in question. The fact of the delivery of the policy was admitted. The judgment of the circuit court is right and is affirmed.

Judgment affirmed.

charged with contempt until he pay unto Fannie O. Wetmore, the petitioner in said cause, or to the clerk of this court for her, the sum of \$2128.07, with interest thereon at the rate of five per cent per annum from May 2, 1914, as required by an order of this court entered in this cause on May 24, 1917, or until he is otherwise discharged from imprisonment by due process of law.

The funds in question were part of the estate of George Howard Lathrop, deceased, and were properly made payable, by the order of the circuit court entered May 24, 1917, to Fannie O. Wetmore, as executrix of the last will and testament of said decedent, and James J. Finn should not be punished for a failure or refusal to pay her such funds otherwise than as such executrix.

In re Petition of Mulford. 217 Ill. 242, (247), it is said that "an executor is a public officer. Wharton on Conflict of Laws.

Page 2

Section 552; Woerner on Law of Administration, Section 172." In the receipt of such funds she would act in an official capacity and would hold and disburse them as a public officer. The proceedings instituted to enforce a compliance with the decree, of the circuit court, should have been as an executrix and not as an individual. 9 Cyc. 35.

The petition for attachment is not verified. Attached to it is an affidavit of Robert P. Vail, but such affidavit contains no reference to the petition, nor the allegations contained therein. The affidavit purports to be on information and belief. The general rule is that the material allegations in the accusation or affidavit charging contempt must be on the personal knowledge of the affiant. 13 Corpus Juris, 67, 14 Ann. Cas. 1042, 6 R. C. L. 532.

It is suggested, by counsel for defendant in error, that "the original petition filed appears to be in the name of Fannie O. Wetmore, individually, though she refers to herself as the petitioner in the earlier citation proceedings, (that resulted in the rendition of the decree on May 24, 1917), where she clearly appeared in her representative capacity. Whether acting as an individual or as an executrix, she was the same person." In Stephens v. Collison, 249 Ill. 225, (235) where it was contended that the executors to a will were necessary par-

testament of George Howard Lathrop, deceased, \$2,-128.07 and interest. The decree, from which this writ of error is being prosecuted finds that he had not made such payment, that he is in contempt, and orders his commitment to the county jail. Plaintiff in error alleges in his answer, and supplemental answer, to the petition for attachment that he is insolvent; that he is indebted to other persons in the sum of several thousand dollars; that he is unable to comply with the order of court in regard to the payment of the money; that he has no property upon which he can secure a loan with which to make such payment; that he is not in contempt of court; that he did not defy the orders of the court; and that, if it were in his power so to do, he would comply with the order of the court by paying the money.

It is urged that the order of committment violates section twelve of article two, of the constitution of 1870, which provides that "No person shall be imprisoned for debt, unless upon refusal to deliver up his estate for the benefit of his creditors in such manner as shall be provided by law, or in cases where there is a strong presumption of fraud."

Page 5

The funds, part of which belonged to the estate of George Howard Lathrop, deceased, came into the hands of James J. Finn as a master in chancery to be held in trust under the orders of the circuit court. It was his duty to keep the trust fund separate and apart from his own. (Perry on Trusts, 6th Ed. Vol. 1, Sections 427-463; 39 Cyc. 420). To mingle the trust fund with his own and then use it, if the fund was a debt within the above provision of the constitution, to so do would make it a case "where there is a strong presumption of fraud" and bring it within the exception of such provision of the constitution. It may be embezzlement. The custodian of a trust fund cannot purge himself of contempt for a failure to pay over trust funds by showing insolvency; indebtedness to other persons; that he has no property upon which to secure a loan with which to make such payment; or by expressing a willingness to pay if it was in his power to do so. His inability to pay is the result of his illegal act and no excuse or justification for not paying.

In *Wise v. Chaney*, 67 Iowa 73, the respondent was ordered to pay money, belonging to an estate, to an ad-

ministrator. Among other defenses he claimed to have no money of his own or of the estate. The court, in part said, "His other excuse that he had no money of his own in his possession will not do. It would be a convenient way, if this excuse should be regarded as sufficient, for one required to surrender money or property of an estate, to divest himself thereof, and thus defeat the order of the court and justice."

Page 6

In *Peaple v. Zimmer*, 238 Ill. 607 (614) the court said, "We are satisfied upon this record, that if Zimmer does not have this money it is because he has disbursed it improperly and unlawfully, * * * * *. Moreover, where as here, a receiver has wrongfully converted or expended money in his hands and is proceeded against in the cause in which he was appointed for contempt on account of a failure to comply with an order to pay, inability to pay, resulting from the wrongful act, does not present a defense to the proceeding, and the receiver may be imprisoned for the contempt notwithstanding his inability to pay. *Cartwright's case*, 114 Mass. 230." In *Cartwright's case*, cited by our Supreme Court with approval, it is said "As regards the question whether contempt has or had not been committed, it does not depend upon the intention of the party but upon the act he has done. * * * * * The object of an attachment for a gross contempt of this nature being not merely to compel restoration of the money illegally taken, but to punish the offender, can not be controlled by the fact of his not having the present means of repaying what he has abstracted."

"The inability to pay must clearly appear, and when the inability is due to the wrongful act of the party himself, the contempt is not excused, as where he has misapplied or misappropriated funds held by him as attorney, administrator, receiver, guardian, or in other trust capacity." 13 *Corpus Juris*, Pg. 20.

The amount found due from plaintiff in error to defendant in error by the decree of the circuit court is not a debt within the meaning

Page 7

of the above quoted section of

the constitution, prohibiting imprisonment.

This case will be reversed and remanded. When re-docketed, leave should be given defendant in error, it asked for, to amend the petition for the writ of attachment and to properly verify it. The court should amend its order so that the order of commitment directed to be issued should require the payment of the money, not to Fannie Wetmore individually, but as executrix.

Reversed and Remanded.

Page 8

*Certiorari
denied*

71321

General No. 7020

Agenda No. 22

April Term A. D. 1919.

Central Trust Company of Illinois, Successor in
Trust of Western Trust and Savings Bank
As Conservator of the Estate of William
H. Orendorff, an insane person, Appellant

215 I.A. 657

vs.

Ulysses G. Orendorff, Ulysses G. Orendorff as Trustees,
Ulysses G. Orendorff as Administrator of the
Estate of Mary L. Orendorff, deceased; Arthur
L. Orendorff, Parlin & Orendorff Company,
a corporation, and William H. Parlin,
Appellee

Appeal from the Circuit Court of Fulton County.

GRAVES, P. J.

A bill in chancery was filed by appellant in the Circuit Court of Fulton County seeking to have 6250 shares of stock in the Parlin and Orendorff Company and certain moneys accruing therefrom, all in the hands of appellee, Ulysses G. Orendorff and claimed by him as his own property, declared to be the property of the estate of Mary Orendorff, deceased, and transferred to the said Ulysses G. Orendorff as administrator of the estate of Mary Orendorff, deceased. After issue was joined on the bill the same was referred to the Master in Chancery to take proofs and report the same together with his conclusions of law and fact. In due time the master made his report finding that there was no equity in the bill; that Ulysses G. Orendorff was the absolute owner of the property in question and that the bill should be dismissed at the cost of appellant. The matter in due time came before the court for hearing on the master's report and exceptions thereto. The exceptions to the master's report were overruled and such report was confirmed by the court and a decree was entered in which the findings of the court corresponded to

Page 1

the findings of the master and the bill was dismissed for want of equity.

The question of the ownership of this same property was before the Supreme Court in the case of the **People v. Orendorff** 262 Ill. 248 in a proceeding by which it was sought to have the same declared to have

*Curator
denied*

General No. 7024

Agenda No. 52

April Term A. D. 1919.

HOWARD VAUGHN, Appellee

vs.

W. C. BATES, P. B. JOHNSON AND ROBERT

HUMPHREY, Executors of the will of E.

W. BATES, and the Latham Coal and

Mining Company, a corporation,

Appellants

215 I.A. 657

Appeal from the Circuit Court of Logan County
GRAVES, P. J.

The Latham Coal and Mining Co. one of appellants was formed in 1915 with a capitial stock of \$36,000, represented by 360 shares at a par value of \$100. At the time of the transactions involved in this litigation E. W. Bates, now deceased, was a director and the president of that corporation. At the start he became the owner of ten shares of the stock and gave five of those to his son W. C. Bates who is one of the appellants herein. By the end of 1916 or the first part of 1917 he was the owner of 198 shares of that stock that cost him \$19,800. There were five directors of that corporation, E. W. Bates, W. C. Bates, a son of E. W. Bates, and E. C. Lutz a son-in-law of E. W. Bates were directors and constituted a majority of the board. Lutz was also the secretary and treasurer of the company. During the months of February and March 1917 the company paid one hundred and fifty five per cent dividend, which meant a profit to E. W. Bates of \$30,690 on an investment of \$19,800, in less than two years. Besides the dividends so divided the company had on April, 1917 in cash and bills receivable \$47,433.32 as net profits for the previous twelve months. E. W. Bates, W. C. Bates and E. C. Lutz were each familiar with the affairs of the company. Appellee was the owner of

Page 1

two shares for which he had paid \$200 and claims to have known nothing about the affairs of the company except what was told him by Bates or Lutz. In the first part of April 1917 appellee sold to E. W. Bates his two shares of stock for \$200. Shortly thereafter appellee tendered back to Bates the \$200 he received for his stock together with 5% interest thereon while the same had been in his hands and soon thereafter filed his bill in chancery charging that Bates had

defrauded him in the transaction and praying that the sale and transfer of the two shares of stock from him to E. W. Bates be set aside and the said shares be surrendered to him and that Bates be required to account for all dividends he has received on said two shares since April 6, 1917, which the evidence shows is 100 per cent, and that the coal company be compelled to transfer said two shares of stock to him on its books. The cause was referred to the master and on a hearing before the court on exceptions to the master report the court found the issues for the complainant and granted the relief prayed for. An appeal was prayed for, allowed and perfected by E. W. Bates and the Coal Company. Since that time E. W. Bates has departed this life and his executors have been substituted in his stead and are now prosecuting the appeal.

The correctness of the decree depends on whether the story told by appellee about the conversations he had with E. W. Bates and E. C. Lutz on April 1 and April 6, 1917 is true or false. He testified that on April 1, 1917 he met E. W. Bates and Lutz on the streets and Lutz told him of the last dividend declared and paid before that time and that Bates

Page 2

then said "This is all of it, there will be no more dividends" that appellant said "If there will be no more dividends I will sell my stock at par" and that Bates said "I will take it." As to the conversation on April 6, 1917 he testified that he went to the Coal Company's office with his certificates of stock and there met Bates and said to him "I have got that stock here now to deliver to you under the understanding that the money has all been delivered up and no dividends declared that I haven't received and no money here with which they could be declared with" and that Bates then said "Yes, that Mr. Lutz was a witness" and that Lutz then told him there was \$13,590 on hand that had been set aside for specific purposes named; that appellee then said "If that is all there is I will waive that and I am satisfied" and that Lutz then said "that is all" whereupon appellee then and there surrendered the certificates of stock. It is undisputed that at that time there was in the hands of the company cash or its equivalent amounting to \$47,433.32.

A book-keeper in the employ of the coal company

testified that he was present in the office of that company on April 6, 1917 and heard the conversation between appellee, E. W. Bates and Lutz; that appellee came in and said "I will sell my stock or this stock to you Mr. Bates with the understanding that there is no money here with which to declare any dividends and that all dividends to date have been paid", that in case there were any more dividends or any more money there with which to pay dividends "I am going to come against you" that Bates then said "I will use Mr. Lutz as a witness that there is no more money here with which to

Page 3

pay dividends" that Lutz then said there was about \$8500 or \$9000 which they expected to buy mining cars with and about \$5000 with which to pay corporation tax and that that was all; that appellee then said "then I am satisfied." A book-keeper for appellee testified that he saw the stock in appellee's possession on April 6, 1917. Appellee also testified that he believed the statements made to him by Bates and Lutz and on the strength of those statements sold his stock at par. Both Bates and Lutz deny that the foregoing conversations took place. Bates says the shares of stock were delivered to him on April 4, 1917. Both Bates and Lutz testify that Lutz told appellee there was "roughly about \$30,000 on hand or due the company" and went into detail as to how that money was going to be expended. Appellee denies that statement. There are some other circumstances testified to tending to corroborate both sides, but it is not necessary to point these things out in detail.

Appellants have assigned several errors but they have pointed out six reasons why the decree is erroneous. **First** "that the decree is directly contrary to and unsupported by the evidence" and **Second** "that it makes findings of fact directly contrary to the testimony of Vaughn himself." We have carefully read and considered all of the evidence abstracted and much of the record itself and are fully convinced that the findings of fact made by the Circuit Court are warranted by the evidence. Even on the evidence of Bates and Lutz there was more than \$17,000 more money on hand and due to the company than they told appellee for they say they told him there was roughly \$30,000 and the proof shows there was \$47,433.32, and it is just as fraudulent to de-

fraud appellee out of

Page 4

\$17,433.32, the difference between what they actually had on hand and the amount they say they told him they had, as it would be to defraud him out of \$33,933.32 which is the difference between the amount actually on hand and the amount appellee says they told him they had. The fraud is found in the means employed and not in the amount secured by such means.

The **third** contention is "that it is wholly untenable by the rules of law applicable to the facts in the case." If we understand the argument of appellants in support of this contention it is that the statements relied on by appellee are expressions of opinion, promises, expressions of intention or purposes or predictions. The fraud in this case was not in the prediction or expression of opinion that there would be no more dividends declared. Neither was it important whether they explained truthfully what they expected to do with the money on hand nor what in fact eventually became of the money. It was the making of wilfully false statements as to the amount of funds then on hand or due the company for the purpose of inducing appellee to part with his stock at par that constituted fraud. It is also urged possibly as a branch of this third contention that the sale was completed on April 1 and the false representations were not made until April 6th and therefore could not have induced the sale. The evidence does not support the contention. In the first place on April 1 if appellee is to be believed Bates said "this is all of it," evidently meaning that the funds from which dividends had been paid was exhausted, and appellee replied in substance "if that is so I will sell my stock at par" and Bates said "I will take it." But Bates did not then take it or pay for it. On the April 4th Bates gave to appellee a piece of paper while appellee was engaged at a

Page 5

game of cards at the club. No explanations were then made and appellee did not know until later that he had been given a check, and when he first found out it was a check he thought it was for expenses for a trip he was to make to Springfield for Bates. The proof is abundant that appellee did not deliver the stock certificates until April 6th

and did not cash the check until after that. We think it is clear that neither of the parties to this deal considered it closed until the certificates of stock had been delivered.

The fourth contention is "that upon no theory could the court ignore the express waiver by Vaughn or any interest in \$13,500 of the assets of the corporation of the date April 1, 1917." That waiver was conditional. If that was all the money on hand he waived all rights to his share of it, but it was not all by over \$30,000, and therefore the waiver was not binding. It was also conditional on the consummation of a **bona fide** sale of the stock. It was part of the transaction which the Circuit Court has decreed was not **bona fide** but on the contrary was void for fraud.

The **fifth** contention is "that there is no proof showing that the dividends afterwards paid were paid out of assets of the corporation of April 1, 1917, and it is manifest that at least two of the three of the subsequent dividends were not." Whether or not that is so is wholly immaterial in this case. The transfer of the stock of appellee being annulled for fraud appellee is entitled to all dividends paid on those shares while the same were in the hands of Bates.

The **sixth** and last contention is "that the Court should have found there was no fraud on the part of Mr. Bates and that said sale was **bona**

Page 6

fide and valid and the court should have dismissed the bill at the costs of complainant Vaughn." What has been said disposes of this contention. The decree appealed from was manifestly correct and is affirmed.

Decree affirmed.

Page 7

General No. 7056.

Agenda No. 37.

April Term A. D. 1919.

JOSEPH PIERSON, J. MARY PIERSON and
HARRIET PIERSON, Appellees,

vs.

O. E. LAWYER, Appellant.

Appeal from the Circuit Court of Sangamon County.
GRAVES, P. J.

This is an appeal from a judgment of the Circuit Court of Sangamon County in a Forcible entry and detainer case tried in that court on appeal from a Justice of the Peace.

Late in 1916 the parties to this suit made an oral agreement for the leasing of the premises in question and also agreed that the lease should be later put in writing. In June, 1917, it was reduced to writing and signed by the parties. This lease was by its terms to terminate on March 1, 1918. There was also a stipulation in the lease evidently having reference to some talk previously had about a continuance of the terms of leasing for another year after March 1, 1918. That stipulation is to the effect that a definite decision between the parties as to the disposition of the premises for the year beginning March 1, 1918 should be reached before July 1, 1917.

No agreement between the parties for the possession of the premises by appellant after March 1, 1918 is shown to have been made.

It was also stipulated in the lease that if default should be made by the lessee in the payment of rent or any of the terms of the lease that appellees might re-enter the premises with or without process of law and that at the expiration of the lease appellant would surrender

Page 1

possession to appellees without notice. He did not surrender possession of the premises and this suit was begun to recover such possession. The court directed the jury to return a verdict for appellees that they were entitled to the possession of the premises which was done.

The only error complained of is that the court did not permit appellant to prove an oral agreement made in June, 1917 for the rental of the premises for a year following the first of March 1918. An oral agreement

Approved filed Oct 21-1919

Per 29 R H daniel

2151.A. 607

for the rental of land for a period to extend beyond a year from the time the agreement is made is void. **Olt v. Lohnas Et Al.**, 19 Ill. 576. **Comstock v. Ward** 22 Ill. 248. **Wheeler v. Frankenthal** 78 Ill. 124, **Cooney v. Murray** 45 Ill. App. 463. **Rader v. Huffman** 125 Ill. App. 554, **Lears v. Moore** 122 Ill. App. 351. A part performance of a verbal contract void under the statute of frauds is not a good defense in a court of law, and a mere holding over by a tenant does not renew the tenancy except at the landlord's election. **Wheeler v. Frankenthal** 78 Ill. 124, **Brockman v. Davis** 172 Ill. App. 50 and cases therein cited.

Aside from the merits of the case this judgment could properly have been affirmed for want of a proper abstract.

The judgment of the Circuit Court is affirmed, and the costs of the additional abstract furnished by appellees will be taxed to appellant.

Judgment affirmed.

General No. 7059.

Agenda No. 40.

April Term A. D. 1919.

CHARLES CROWDER, Appellee,

vs.

CLEVELAND, CINCINNATI, CHICAGO &

ST. LOUIS RAILWAY CO., a corporation,

Appellant.

Appeal from the Circuit Court of Coles County.

GRAVES, P. J.

One R. S. Murphy had a contract with appellant by which he was to and did, construct for appellant a passenger depot at Charleston, Illinois. Appellee made a contract with Murphy whereby he was to do the work of painting that depot, but he did not contract to furnish the materials. When the depot was ready for the painter to do his work there was no material there to do it with, and the foreman of Murphy, the general contractor, told appellee to furnish the material and that Murphy would pay him extra for it. Before the work was done, one A. F. Maischaider came to Charleston. He was an engineer in the employ of appellant having charge of the maintenance and repairs of the track roadway and buildings of appellant. His duties required him to inspect buildings while in process of construction and see to it that they were constructed in accordance with the plans and specifications and to make estimates of work done as it progressed, but had nothing to do with paying for work and labor performed under contract and no authority to make or let contracts for the construction of buildings. Appellee says he told Maischaider that his estimate for the work was \$138; that he was not to furnish the material and that the material had not been furnished; that Maischaider said go ahead and furnish the material and "you

Page 1

will get your money;" that "they owed him eight hundred dollars" * * * "and would pay all bills and pay me for work if I would finish it." Appellee finished the work and furnished part or all of the materials used by him on the job and when it was completed wrote Murphy and asked for his pay. Murphy did not send it but wrote appellee a letter in which he said he would be down in a week or two and pay him, but did not do so and appellee began this suit in assumpsit against appellant to collect his bill. The case was tried by the

Court without a jury. The court found the issues for appellee, assessed his damages at the sum of \$418, and rendered judgment against appellant for that amount and for costs.

The record is barren of any evidence tending to show that Maischaider had any authority to make such a contract. It requires the citation of no authorities to show that without such authority he could not bind appellant by his promises although made in the most solemn manner and in the most unmistakable terms. Besides that, the record affirmatively shows that appellee did not understand that appellant was to pay the bill, for he not only charged both the labor and materials to Murphy but demanded of him payment therefor before seeking to collect the bill from appellant.

That appellee might have secured his pay from appellant by a proper proceeding under the lien statutes is altogether likely, but that he cannot recover in this action is certain unless at a further trial he is able to show some authorized act binding on appellant from which a

Page 2

promise to pay is shown or must be implied.

The judgment of the Circuit Court is reversed and the cause is remanded to that court.

Reversed and remanded.

Page 3

✓ This cause was tried on former brief, abstract etc. Appeal
from Champaign. Trial Judge Franklin P. Boggs. Attorneys for
Appellants, Green & Palmer. Attorneys for Appellee, Dobbins
& Dobbins. ✓

General No. 6840.

Agenda No. 65.

October Term A. D. 1917.

Edward L. ^{mya} ~~Begg~~, Jr. Executor of the Estate of
John Thrash, deceased, Appellant.

vs

Perry Thrash, Appellee.

215 I.A. 658

Appeal from Circuit Court Champaign County.
ELDREDGE, P. J.

This is an appeal from a judgment rendered in favor of appellee in an action of trover, originally begun by the conservator of John Thrash, a feeble minded person, to recover the value of a promissory note for the principal sum of \$2,000.00 with interest at five per cent per annum, dated April 11, 1908, executed by Perry Thrash, appellee, and payable to the order of said John Thrash. During the trial, the conservator died and appellant, as executor of the last will and testament of John Thrash, deceased, was substituted as party plaintiff. The cause was heard before the court without a jury.

On May 9, 1916, John Thrash was taken sick with pneumonia and at this time and for several years prior thereto he had also been afflicted with prostatitis. He had a high fever and was very sick. There is no evidence that anybody lived with him. He was an old man about eighty years of age. The pneumonia lasted about ten days, during

Page 1

much of which time he was irrational. Dr. C. A. Mallory attended him on May 9 and at that time he was lying in bed in a very debilitated condition. He had on his overhals, coat, vest, shoes, stockings and a big stocking cap drawn over his head. On May 10, J. P. Crawford, a male nurse, was procured to take care of him. He found him in a filthy condition and with numerous bed sores. It was several days before the nurse could persuade him to remove his clothing. The pneumonia lasted about ten days during which time he was visited by Dr. Mallory every day. John Thrash was the father of appellee. On May 11 appellee came to the home of his father and told Crawford the nurse that his father wanted to give him a book and asked if his father had said anything to him about it. Appellee also asked his father if he wanted to give him the book but the latter made no reply. A day or two thereafter ap-

pellee again came to the house and again asked his father if he wanted to give him the book. His father told him to get the key out of his pocket book and open the trunk, which appellee did and took from the trunk a small brown backed book and held it up to his father who said that that was the book. His father then told him to take the book to the bank and that Allen Bowers would put it in his box there with his papers and that he and Allen would have to look after his business. Mr. Allen Bowers was cashier of the Bank of Tolono. John Thrash also told appellee that

Page 2

the book contained a list of his business accounts. Either on that day or shortly thereafter appellee went to the bank and told Bowers that his father had given him "that \$2,000.00 note" and also that his father wanted him to look after his business, loan his money, pay his bills, see that he was properly taken care of, employ a nurse if he should require it, get a doctor, and take care of his business matters, and that his father said to him, "I want you to take that \$2,000.00 note." Bowers told appellee that he had better go back and have his father say something about this gift before witnesses, as the transaction might be questioned and appellee replied that he couldn't do that because he didn't want anybody to know about it as it might start some trouble. Bowers then requested him to take the note and have his father endorse it on the back as satisfied and sign his name to it. Appellee replied that he did not like to bother about it; that it is all right, it is nobody's business but his father's and his own, and that he was not going to bother about it any more. On May 15, appellee again appeared at the bank and told Bowers that he wanted his father's papers. Bowers thereupon gave him the box which contained the papers. Appellee opened the box and took out the notes belonging to his father and said to Bowers, "I am going to take this \$2,000.00 note because my

Page 3

father has given it to me and I want to leave something to show why I took the note." Thereupon Bowers drew up the following receipt, which appellee signed:

"Tolono, Ill., May 15, 1916.

\$2,000.00

I have received of the Bank of Tolono a note signed

long had caused an inflammation of the bladder, which resulted at times in pain and had produced a poisonous condition to his system and also a weak heart.

Page 5

There is no evidence to contradict his physical condition, but five witnesses, who had been acquainted with him, testified that in their judgments from casual meetings with him, he had sufficient mental capacity to transact his ordinary business affairs, though one of these witnesses admitted that when he met him on the occasion mentioned, he did not know the witness's name nor remember that he had ever seen him before although he had been acquainted with him for over ten years. It is however unnecessary to determine whether John Thrash had mental capacity sufficient to understand his ordinary business affairs or not as the case may be determined on the question whether there was a valid gift of the note irrespective of the mental condition of the donor. Leaving out of consideration the mental condition of John Thrash at the time when the gift of the note is alleged to have been made, there is no conflict in the evidence. The case was tried before the court who saw and heard the witnesses and his finding upon the facts, if the evidence had been conflicting, would not be disturbed by this court unless clearly contrary to the manifest weight of the evidence, but the record before us presents only the question of law whether the facts proven are sufficient to establish a gift of the note in question.

The evidence clearly shows that appellee became possessed of the note by virtue of the request of his father to take possession of

Page 6

his papers and take care of his business in conjunction with Allen Bowers, the cashier of the bank, while he was sick. This agency or trust established a fiduciary relation between the parties in addition to that of father and son. This fiduciary relation having been established, the burden was upon appellee to clearly prove all the elements essential to a valid gift. *Morgan vs Owens*, 228 Ill. 598; *Dwyer vs O'Connor*, 200 Ill. 52. At the time appellee took possession of this note the evidence conclusively shows that his father was very seriously ill with pneumonia and very feeble in mind and body. He was eighty years of age, had been troubled for several years with prostatitis, which at times

produced severe pain and was in fact in a state of senility. In the case of *Hensen vs Cooksey*, 237 Ill. 620, the circumstances surrounding the parties were very similar to those shown by the evidence in this case, and the court there said, "The relation between appellant and appellee was of a fiduciary character. While the evidence does not show a want of mental capacity on the part of Mrs. Hensen, it does show that she had recently been quite ill. She was old and feeble. Her physical condition was very much reduced, and on the day she executed the deed she was so nervous, weak and exhausted that she could not have been capable of serious mental effort. Her son had managed her business affairs when they required attention. She

Page 7

relied upon him when complications arose in connection with them, and she believed that his efforts had saved her property for her. He had himself proposed returning to the farm, to fix it up and live there. She had leased it to him upon a consideration to be afterward determined. Their relation was one of confidence reposed by her and is inconsistent with the idea that they were dealing at arm's length. A fiduciary relation exists in every case 'in which there is confidence reposed on one side and the resulting superiority and influence on the other. The relation and the duties involved in it need not be legal; it may be moral, social, domestic or merely personal.' *Irwin v. Sample*, 213 Ill. 160; *Walker v. Shepard*, 210 id. 100; *Roby v. Colehour*, 135 id. 300." The burden of proof was upon appellee to satisfy the court that he dealt at arm's length with his father and that there was in fact a **bona fide** gift of the note to him. Three facts are relied upon by counsel for appellee as establishing the gift-- the possession of the note by appellee, the statement of appellee to Bowers that his father had given him the note, and the alleged admission of the father to Telford that he had given the note to appellee. The possession of the note by appellee procured by a general authority to take possession of all the papers of his father for the purpose of transacting the latter's business while he was sick, cannot be considered as evidence of owner-

Page 8

ship of the note. While the declarations of a donee in possession are admissible to show

claim of ownership, (Martin vs Martin 174 Ill. 371), yet they are not in themselves sufficient evidence to establish the substantive fact of the gift. And the same is true of the alleged declarations and admissions of the supposed donor. Campbell vs Sech, 155 Mich. 634; Merchant's Loan & Trust Co. vs Egan 143 Ill. Ap. 572; Fouts vs Mance, L. R. A. 1916 E. p 283; 20 Cyc 1222, 1223, 1225, 1226. The proofs fail to satisfactorily show as a matter of law that the note in question was a valid gift to appellee by his father. The judgment of the trial court is reversed and judgment is entered in this court in favor of appellant and against appellee for the sum of \$2,452.66 and costs, which judgment includes interest at five percent from April 11, 1915. The judgment of this court will also embrace the following finding of ultimate facts:—

The Court finds as ultimate facts; first, that Perry Thrash, appellee, took possession of the note in question and destroyed the same; second, that when he received said note the relation between him and his father was of a fiduciary character; third, that his father did not make a gift of the note to him; fourth, that he did not receive said note as a gift from his father but in trust only; fifth, that at the time appellee took possession of the note and at the time he destroyed the same, and at all times thereafter until the death of his father, John Thrash, said note was the property of said John Thrash or his conservator, and is now the property of the executor of the estate of John Thrash deceased, and that there is now due on said note \$2452.66.

General No. 6919

Agenda No. 50

April Term A. D. 1919.

HARRY J. McDONALD, Appellant

vs.

MATTHEW B. McDONALD, Appellee

Appeal from Circuit Court, McDonough County.

ELDREDGE, J.

Appellant filed his bill in the Circuit Court of McDonough County to set aside the will of Rachael J. McDonald, his mother. Appellant and appellees are brothers. Appellees made a motion in the Court for a rule on appellant to file security for costs which motion was supported by appellee's affidavit in which he states that he knows the financial condition of appellant and that the latter has no real or personal property liable to execution from which costs in the suit could be collected. was insolvent and unable to pay the costs in the suit. Appellant filed a cross-motion for leave to prosecute his suit as a poor person. The Court overruled the cross-motion and entered a rule upon appellant to file security for costs by September 27, 1917. Appellant failed to comply with the rule and the Court dismissed the bill for such failure. In his affidavit in support of his motion for leave to prosecute as a poor person,

Page 1

appellant states that he is a painter by trade and earns at times \$18 per week; that his family, consisting of his wife and a boy nineteen years old, live in Bushnell, Illinois, in a house for which appellant pays \$15.00 per month rent; that appellant rents a room in Galesburg, Illinois, during most of the year so as to be near his work, which room rent costs him \$5.00 per month; that he has no real or personal property of his own and no financial means except the wages which he earns; that it takes all that he can earn to support his family; that he has requested a number of different persons to sign his security for costs, but none had been willing to do so, and that he has a meritorious cause of action. By the express terms of the statute a motion of this character is addressed to the discretion of the Court, and it is only when the record shows that this discretion has been abused can its judgment thereon be reversed. Appellant's affidavit shows that he is capable of earning \$18.00 a week at his trade. A person receiving such compensation for his labor can-

not to be considered in that class of persons who are too poor to pay the costs of law suits and therefore have the privilege of conducting the same at public expense. It is not sufficient

Page 2

in order to be entitled to the privilege of prosecuting law suits without paying any costs for a person to show that he has no property subject to execution or that he cannot give security for costs as he may have other means by which the costs can be paid. Tracy vs Bible, 181 Ill. 331. We can not hold in this case that the trial court abused its discretion in entering the orders complained of.

The judgment of the Circuit Court is affirmed.

Mr. Justice Waggoner took no part in the consideration of this case.

Page 3

General No. 6952

Agenda No. 6

April Term A. D. 1919.

MARY G. BELL, etc.,

vs.

JOHN H. WOOD, et al

JOHN H. WOOD, Plaintiff in Error

vs.

ORA GRIDLEY, Defendant in Error

Writ of Error to Circuit Court McLean County

ELDREDGE, J.

Two bills in chancery were brought to partition different lands in which both plaintiff in error and defendant in error were interested. In one of the suits, entitled Logan A. Gridley vs John H. Wood, et al, an appeal from the decree was taken to this court and decided at the April Term thereof, 1919, and an opinion filed at that time. This is a writ of error to the Circuit Court to review the decree entered in the other partition suit. The question involved in this cause is whether the Court erred in decreeing to defendant in error out of the proceeds of the sale of the real estate, the sum of \$1,125.00 as a partial distribution for the payment of alimony supposed to accrue to defendant in error under a decree for divorce entered in the Circuit Court of McLean County in which defendant in error se-

Page 1

cured a divorce from her husband. Edwtrd B. Gridley, and which alimony accrued after the death of seid Edward B. Gridley. This same question arose between the same parties on the appeal from the decree in the other suit mentioned and our decision rendered in that case is res adjudicata, and the decree is therefore affirmed.

Page 2

*Certiorari
denied*

General No. 7015

Agenda No. 18

April Term A. D. 1919.

WILLIAM P. SHADE, as surviving partner of
the firm of P. H. HUNT & CO., Appellees

vs.

CITY OF TAYLORVILLE, Appellant

Appeal from Circuit Court Christian County.

ELDREDGE, J.

Appellee as the surviving partner of the firm of P. H. Hunt & Company sued appellant to recover an unpaid balance due the partnership on a street paving contract and on the first trial of the cause a judgment was rendered in favor of appellant. This judgment on a former appeal was reversed by this Court and the cause remanded. Shade vs City of Taylorville, 212 Ill. App. 512. A second trial was had resulting in a judgment in favor of appellee for the sum of \$13,000.22 to reverse which the present appeal is prosecuted. The last trial was had before the Court without a jury upon substantially the same evidence and pleadings as the first trial. The same questions of law and fact are again presented to this Court on this appeal by appellant as were presented on the former appeal, and we are bound by our former opinion in regard thereto. Belskis vs Dearing,

Page 1

Coal Co., 246 Ill. 62; Penn Plate Glass Co. vs J. H. Rice Co., 216 Ill. 567; Conner vs Conner, 163 Ill. App. 436.

The only question which we can consider on this appeal is the correctness of the computation of the amount found due by the trial court. The trial court in casting the account strictly followed the law as declared in our former opinion and there is no question that the account is correct except as to a few minor items totaling \$158.50. These items all pertain to certain payments made to appellee as the work progressed. The payments were made in accordance with statements or bills prepared by the bookkeeper of appellee and the city engineer and were checked over by the engineer, who had them typewritten and were paid on his certification. In the first item is an error of \$1.00 for the payment of 90 feet of curbing at fifty-five cents per foot. The amount set out in the statement was \$50.50 when it is claimed it should have been \$49.50. Another item of 55 feet of curbing at fifty-five cents was totaled at \$35.75, making an apparent error of \$5.50. An item of

215 I.A. 658

1010 yards of paving at \$1.47 per yard was totalled at \$1,484.70 showing an apparent error of \$4.90. Another similar item showed an apparent error of ten cents, another of \$98.00, and another

Page 2

of \$49.00. The witness, C. A. Rhoades, was employed by appellant to make an investigation of the account between appellant and appellee. He was the only witness who testified in regard to these alleged errors and stated that he had no means of knowing whether the error was in the total or whether the totals were in fact correct and the errors were typographical errors in regard to the exact number of feet and yards.

In such a lengthy account consisting of a very large number of items, it would not be unusual that some minor errors might be made in the computations thereof. It is shown by the evidence, however, that all these items were checked up by the city engineer representing the appellant and the bookkeeper for appellee who represented the latter and that the totals were found to be correct at that time and were paid by appellant in accordance with the statements made and certified by its engineer. Such being the facts, the presumption is that the totals are correct and the burden was upon appellant to show that they were in fact erroneous.

The judgment of the Circuit Court is affirmed.

Page 3

General No. 7028.

Agenda No. 27.

April Term A. D. 1919.

STATE BANK OF CHICAGO, Appellee,

vs.

W. H. WHITAKER, Appellant.

Appeal from Circuit Court Shelby County.

ELDREDGE, J.

Appellee obtained a judgment in the sum of \$1611.01 in an action of assumpsit to recover the amount due upon two promissory notes executed by appellant and payable to the order of one **Irving** Shuman. The defendant filed a plea as follows: "For a further plea in this behalf, said defendant says that the plaintiff ought not to have it's aforesaid action against the said defendant by reason of anything alleged in said declaration mentioned, because, he says that the two notes in the said declaration mentioned were each made to one, Irving Shuman, and that he, the said Irving Shuman, being indebted to the State Bank of Chicago, a corporation, placed said two notes with said bank as collateral security for the indebtedness of the said Irving Shuman to said bank, and that this defendant has paid said notes to the said Irving Shuman, and that upon the payment of said notes to the said Irving Shuman he, the said Irving Shuman, by and with the consent of said bank and upon the prom-

Page 1

ise of the said bank to return said notes to this defendant, placed with said bank, other collateral security in the place of the said notes in said declaration mentioned, but that the said bank has wholly failed and does refuse to deliver defendant's said notes in said declaration mentioned as they did promise as hereinbefore alleged, and on the contrary have instituted this suit for the collection of said notes, and this the defendant is ready to verify."

The only error presented for review is the action of the Court in refusing to grant a motion for a continuance made by appellant. The suit was instituted in the Circuit Court of Shelby County to the March Term thereof and service had on defendant February 6, 1918. Appellant filed his pleas at the March Term and the case was continued until the June Term, when it was again continued to the November Term. At the November

215 LA. 658

Term the case was called for trial on the 25th day of November. On this day, appellant made a motion for a continuance supported by two affidavits. Appellant's affidavit states in substance that the notes in question had been paid to one **Irwin Shuman**; that said Irwin Shuman is now insolvent; that Irwin Shuman advised appellant that the notes upon which this suit is brought were deposited with appellee together with other notes as collateral for his notes of about the same amount; that appel-

Page 2

lant does not now remember the collateral which was put up along with appellant's notes, but that said Irwin Shuman does know and advised appellant that upon the payment of said notes, if he was compelled to pay said notes, that he would be entitled to the other collateral that had been placed up along with appellant's notes, his, Shuman's own notes; that the only information appellant has on the subject is the information which he has from the said Irwin Shuman and is not in position to produce evidence to prove said facts except by the testimony of said Irwin Shuman; that appellant is advised that said Irwin Shuman is now somewhere in France in the United States Army, having left the State of Illinois some time ago and appellant tried to locate said Irwin Shuman for the purpose of getting his deposition; that appellant wrote two or three times to ascertain the whereabouts of said Irwin Shuman in order to get his deposition and that all letters were returned unopened indicating said Irwin Shuman had not been found, but from an account in a newspaper and from talking with M. G. Kibee, an associate of the said Irwin Shuman, this affiant was advised that said Irwin Shuman was in France in the service of the government and that it is impossible to procure his testimony at this time, that appellant endeavored to locate said Irwin Shuman for the purpose of

Page 3

getting the testimony from him; that he cannot proceed to trial without the presence of said Irwin Shuman or his deposition and if this case is continued until the next term, he believes he can locate the said Irwin Shuman and secure his deposition or testimony; that the above facts have been told him by said Irwin Shuman and upon such information states that said facts are true and that by no other person can he prove

them.

This affidavit is defective for several reasons. There is no averment in the affidavit which shows with reasonable certainty that the witness Shuman ever was, in fact, in the army. Shuman's place of residence is not given and there is no such showing as is required by law to show due diligence in ascertaining his whereabouts. Whether Shuman was, in fact, in the United States military service and whether he was in this country or in France, could have been ascertained with certainty and with slight effort. The testimony which Shuman would be able to give, if present, as set out in the affidavit, would have availed appellant nothing in the defense of the suit and was far from supporting the allegations of the plea.

The other affidavit was made by one of the attorneys for

Page 4

appellant, which was subsequently amended. It does not state facts sufficiently to show diligence in ascertaining the whereabouts of said Shuman. In this affidavit the name of the witness is given as **Irvin Shuman**. The amendment to this affidavit which is made upon information given to the affiant by **appellant** states: "That the two notes described in the declaration in this cause were made to Irvin Shuman; and that Irvin Shuman was indebted to the said State Bank of Chicago, a corporation, and placed said two notes with said bank as collateral security for some indebtedness that the said Irvin Shuman owed the said bank; that both of said notes have been paid to Irvin Shuman and that other collateral security had been placed with said bank in place of said two notes, and that it was promised that the said two notes would be returned to W. H. Whitaker; that said notes were not returned to W. H. Whitaker, but that suit was instituted to collect said notes from the said W. H. Whitaker."

The affidavit does not say who promised that said two notes would be returned to appellant if appellant paid the amount of said notes to Shuman. The plea avers that the appellee Bank made this promise. Affidavits in support of motions for a continuance must be construed most strongly against the party pre

Page 5

sending

them. From anything appearing in this affidavit, Shuman himself might have promised appellant to have his notes returned to him by the bank if he would pay them. He might have used this promise to persuade appellant to pay him the amount due on the notes when he was not in a position to deliver them to appellant. Appellant's liability on these notes was not released when he paid them to Shuman without delivery of the notes to him, unless there was some contract with appellee who held the notes, which would enure to appellant's benefit by absolving him from liability on the notes upon his paying the same to said Shuman. The evidence which Shuman would give, as set out in these affidavits, would not tend to support any such contract, as it is not stated in either affidavit that Shuman would testify that the Bank made said promise. It is also urged that these affidavits are insufficient because Shuman's first name is not spelled correctly in either one. The declaration, the notes and the pleas show the correct name to be **Irving** Shuman. Appellant's affidavit refers to him as **Irwin** Shuman, his counsel's affidavit refers to him as **Irvin** Shuman, but it is unnecessary for us to determine whether the doctrine of **idem sonans** should be applied in this instance. The Circuit Court did not err in overruling the motion for a continuance and the judgment is affirmed.

General No. 7055.

Agenda No. 36.

April Term A. D. 1919.

T. S. TAYLOR, Defendant in Error,

vs.

O. E. LAWYER, Plaintiff in Error

Error to Circuit Court Sangamon County.

ELDREDGE, J.

In an action of replevin, defendant in error procured a judgment for the possession of five hundred bushels of wheat. There is no conflict in the evidence whatever, as plaintiff in error introduced no evidence except his own testimony, which was simply to the effect that, while threshing on the premises, defendant in error came to him and demanded his half of the wheat. The undisputed facts are that plaintiff in error in the fall of 1917 was a tenant upon a farm owned by John, Harriet and Mary Pierson under a written lease expiring March 1, 1918. Defendant in error leased from the Piersons the farm for the ensuing year and agreed to put in twenty-five acres of winter wheat. Defendant in error went to plaintiff in error before he commenced the plowing in the fall and told the latter that he had rented the land and understood that plaintiff in error was not going to stay another year. Plaintiff in error said "all right" and consented

Page 1

that defendant in error might plow and sow his wheat on the twentyfive acres in question. Defendant in error thereupon plowed and prepared the twenty-five acres and sowed the wheat in controversy thereon. When plaintiff in error's lease expired March 1, 1918, he did not give up possession of the premises but continued therein. When the wheat was ready for harvesting, plaintiff in error cut and threshed the same and when defendant in error demanded the wheat, refused to give it to him. It is first urged that a party cannot maintain replevin when he is only a part owner of the chattels sought to be replevied. This contention is based upon the fact that defendant in error was to pay as rent one half of the crops raised. This principle cannot be invoked by a third party for the law is that a tenant is entitled to the possession of the entire crop as against third persons, who attempt to remove or destroy it until the rent stipulated is delivered or

paid to the landlord. Uffelman vs Railway Co., 194 Ill. App. 42. No demand was necessary because the possession of the wheat by plaintiff in error was wrongfully acquired. Clark vs Lewis, 35 Ill. 417. The evidence proved that a demand would have been unavailing and was therefor excused. Beidick vs Peer, 89 Ill. App. 604.

Page 2

Plaintiff in error's action, however, in representing to defendant in error that he intended to remove from the premises at the termination of his lease, and giving him permission to plow and sow the wheat in question clearly creates an estoppel from now claiming any right to the possession of the wheat. Brown vs Burke, 155 Ill. App. 249; McCarthy vs La Vasche, 89 Ill. 270.

The judgment of the Circuit Court is affirmed.

Page 3

